Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DENNIS L. McCLATCHEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit applied an erroneous standard of review under Fed. R. Crim. P. 33 by conducting a *de novo* review of the district court's order conditionally granting a new trial based on prejudicial variance.

2. Whether the court of appeals erred in adopting the "one purpose" test under the Medicare Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b), by which a jury may convict a health care provider of a federal felony if any part of a health care business relationship contemplates possible patient referrals.

3. Whether the district court erred in admitting documentary evidence under Fed. R. Evid. 801(d)(2)(E) authored by lawyers who had been acquitted as co-conspirators or later exonerated by the district court.

4. Whether the Tenth Circuit erred in prematurely ruling the "one purpose" and co-conspirator hearsay issues rather than deferring its decision until the issues were fully presented, as previously ordered in the related and pending case of *United States v. Anderson, et al.*, No. 99-3347 (10th Cir.).

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PETITION FOR A WRIT OF CERTIORARI

Dennis L. McClatchey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a), reversing the district court's judgment of acquittal and conditional new trial order, is reported at 217 F.3d 823. The Order denying Mr. McClatchey's petition for rehearing and suggestion for rehearing *en banc* (App. 128a), with four judges dissenting, is not reported. The Order denying defendant Dan Anderson's motion to consolidate (App. 26a) is not reported.

The opinion of the United States District Court for the District of Kansas (App. 27a) granting Mr. McClatchey's motion for judgment of acquittal and, alternatively, for a new trial is reported at 85 F. Supp.2d 1047. The Order granting in part the motions of attorneys Gina Kaiser, Craig Holden, and David Queen to expunge all references to them as unindicted co-conspirators from the record (App. 109a) is not reported.

JURISDICTION

The decision of the court of appeals was issued on June 13, 2000. A timely petition for rehearing and suggestion for rehearing *en banc* was denied, over four dissenting votes, on August 2, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Section 1320a-7b(b) of Title 42, the Medicare Anti-Kickback statute, provides for criminal sanctions against one who:

> [K]nowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) . . . to any person to induce such person . . . to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program. . . .

Rule 801(d)(2)(E), Federal Rules of Evidence, provides that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT

This case arises out of the prosecution of hospital executives, physicians and the hospital's lawyers under the Medicare Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b). The statute prohibits payment of "remuneration" to a physician "to induce" the referral of patients whose hospital care is paid with federal funds, with specific intent to violate the law. The government charged that executives of Baptist Medical Center ("Baptist"), including Dennis McClatchey, along with the hospital's attorneys, Ruth Lehr and Mark Thompson, conspired to pay Drs. Robert and Ronald LaHue to refer nursing home patients under their care to Baptist under the cover of "sham" consulting services contracts. Significantly, though, the district court found that the Baptist-LaHue relationship was very beneficial to the patients and resulted in financial savings to Medicare. Patients received high quality care, patient choice was respected, and there was no overutilization or misuse of federal program funds. App. 35a-36a.

A. Factual Background[1]

The Drs. LaHue, through their medical practice known as Blue Valley Medical Group ("BVMG"), practiced primarily in nursing homes, treating chronically ill patients who frequently required hospital care. App. 3a. Ronald LaHue approached Baptist in late 1984 with a proposal to involve Baptist in the LaHues' practice. *Id.* The ensuing negotiations between the doctors, the hospital, and the hospital's legal counsel, eventually resulted in a 1985 services contract, under which the doctors became "Co-directors of Gerontology" for Baptist. App. 4a. The contract fees were $75,000/year for each doctor, an amount which continued over the next ten years. *Id.* Shortly after the 1985 contract was executed, BVMG began referring its patients to Baptist. *Id.*

Mr. McClatchey, the chief operating officer at Baptist from 1985 to October 1993, was aware that these negotiations were ongoing but did not participate. App. 34a-35a. Mr. McClatchey supported the idea of the LaHues "bringing patients to Baptist." App. 3a. Mr. McClatchey was not, however, the person who caused the fees to be paid. App. 35a. Further, Mr. McClatchey had no day to day contact with the LaHues or with their relationship with Baptist. App. 40a.

In the summer of 1985, the LaHues asked Baptist to provide management assistance for BVMG. The hospital assigned Baptist employee Tom Eckard to the BVMG offices. App. 4a. Mr. McClatchey had no role in this decision. *Id.*

In June 1986, Baptist entered into another agreement with the LaHues, paying each doctor $75,000 in exchange

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[1] The relevant facts are drawn principally from the opinions below and presented in the light most favorable to the government, based on the manner in which the Tenth Circuit ruled the issues on appeal.

for various services. App. 4a-5a. Again, as both courts below agreed, Mr. McClatchey was aware of contract developments, but was not involved in the process and was not aware of any legal problems with this contract. App. 10a, 65a-66a. And again, the contract was negotiated and approved by Baptist's outside legal counsel, Ruth Lehr, who later became a defendant in this case. App. 39a, 65a-66a.

In response to "safe harbor" regulations mandated by amendments to the Anti-Kickback statute in 1989, and following Baptist's merger into Health Midwest in 1991, numerous meetings were held between outside health care consultants, the hospital's legal counsel, and hospital management, including Mr. McClatchey, to address any legal issues related to Baptist's physician contracts. App. 5a. Mr. McClatchey was never advised that the relationship was illegal. App. 65a-66a.

In early 1992, the LaHues complained that certain people at Baptist would not let them do some of the work required under the 1986 contract. App. 40a, 42a. Mr. McClatchey was surprised and concerned at this news, App. 42a, and directed the hospital officer to bring in outside legal counsel to review the matter and advise on how the hospital should respond. App. 42a-43a. The lawyers, and specifically Mark Thompson who later became a defendant in this case, never advised that the relationship was illegal, but instead commenced a new negotiation process to revise the contract. App. 43a, 65a-66a.

Following inquiries about the Baptist-LaHue relationship from an FBI agent and a state Medicaid investigator on November 5, 1992, Health Midwest's general counsel, Gina Kaiser, and outside counsel Mark Thompson of the Seigfreid Bingham firm, retained the Ober Kaler law firm from Baltimore – nationally recognized in health care law – to help advise on the issues under investigation. App. 6a, 43a. In a November 11, 1992 meeting with all of these

lawyers, which Mr. McClatchey attended, the LaHue relationship was reviewed again, and the lawyers advised on how Baptist should respond. Three areas of legal advice were given: (i) the hospital should continue contract payments to the LaHues; (ii) Eckard should either be put on the BVMG payroll or returned to full-time duties at the hospital; and (iii) the current contract negotiations should be promptly brought to closure. App. 43a-44a. Mr. McClatchey was assigned to deal with the Eckard issue and to conclude the contract talks with a new agreement. *Id.* All of Mr. McClatchey's subsequent actions – the only conduct which the Tenth Circuit held raised a jury issue as to Mr. McClatchey's liability, App. 10a – were directed by legal counsel. App. 65a-66a.

Over the four months following the FBI visit, Mr. McClatchey, attorney Thompson and Dr. Robert LaHue finalized what became the April 1, 1993 contract. App. 46a. This contract required the doctors to perform various duties in exchange for their payments. *Id.* Attorney Thompson approved the contract, in consultations with the Baltimore health care lawyers.

After Mr. McClatchey and Thompson were unsuccessful in persuading Dr. LaHue to hire Eckard, Mr. McClatchey directed Eckard to return to Baptist on March 1, 1993. App. 44a. At a meeting on February 15, 1993, Mr. McClatchey and Thompson made clear to Dr. LaHue that Eckard could perform services for BVMG only if BVMG paid for them. App. 45a-46a. Unknown to Mr. McClatchey, however, Eckard continued to "freelance" for BVMG after his return to Baptist. App. 45a.

B. Procedural Background

The original indictment charged only Drs. Robert and Ronald LaHue with conspiracy and program fraud under 18 U.S.C. § 666 arising out of their relationship with Baptist. The district court dismissed the § 666 counts, and

the Tenth Circuit affirmed. *United States v. LaHue*, 170 F.3d 1026 (10th Cir. 1999). In the meantime, the government issued grand jury subpoenas for testimony and documents from two lawyers – Ruth Lehr and Mark Thompson –who had advised Baptist over the years of the LaHue relationship.

Based largely on the lawyers' documents, the government caused the grand jury to return a superseding indictment against the two lawyers and three hospital executives – including Mr. McClatchey – in addition to the two doctors. The new charges alleged, *inter alia*, a conspiracy to violate the Medicare Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b). The conspiracy was alleged to involve the lawyers, Lehr and Thompson, in devising "sham" consulting contracts, and was alleged to involve the exportation of the Baptist-LaHue program to six other hospitals. The government separately identified a long list of unindicted co-conspirators which included the other lawyers involved in advising Baptist on the LaHue relationship.

At trial, the government relied extensively on documentary evidence, including memoranda, correspondence, and handwritten notes, from the lawyer defendants and the other unindicted lawyers. The defense objected to the admission of the lawyers' documents as hearsay. The government argued that the documents were admissible under Fed. R. Evid. 801(d)(2)(E), the co-conspirator hearsay exception.

The district court acquitted Lehr and Thompson, at the close of the government's case, App. 7a, and exonerated the lawyers named as unindicted co-conspirators, App. 109a, holding that there was "not one shred" of evidence that would have supported the government's charges. App. 75a-76a (n.17). The district court nonetheless admitted the lawyers' documentary evidence under Fed. R. Evid. 801(d)(2)(E), holding that the government need not establish the existence of a conspiracy for the

documents to be admissible under co-conspirator hearsay rule. App. 95a-97a.

The district court also dismissed at the close of the government's case all charges against Mr. McClatchey (and the other hospital executives) involving hospitals other than Baptist, App. 7a-8a, again holding that there was no evidence that would have supported the government's charges that the Baptist executives were engaged in a conspiracy that involved six other hospitals. App. 32a.

The trial continued against the remaining defendants, including Mr. McClatchey, and was submitted to the jury nine weeks after it began. Over defense objections, the district court adopted the so-called "one purpose" rule under the Medicare Anti-Kickback statute and instructed the jury:

> [I]n order to sustain its burden of proof against the hospital executives for the crime of violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration offered or paid remuneration with the specific criminal intent "to induce" referrals. To offer or pay remuneration to induce referrals means to offer or pay remuneration with intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must, *at least in part*, have been the reason the remuneration was offered or paid.

App. 69a (emphasis added). Moreover, the district court instructed the jury to acquit only if it found fees were paid "wholly for other purposes" than obtaining referrals. *Id.*

The jury convicted Mr. McClatchey for conspiracy, 18 U.S.C. § 371, and violating the Medicare Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b). On July 21, 1999, the district court granted judgment of acquittal for Mr.

McClatchey, holding that "[t]he evidence was simply insufficient for a reasonable jury to find Mr. McClatchey specifically intended to join a conspiracy specifically intending to do something the law forbids." App. 68a. In the alternative, the district court granted Mr. McClatchey a new trial pursuant to Fed. R. Crim. P. 33 and 29(d), finding two material variances between the government's charging theory and the actual evidence – the utter absence of any evidence on the charges of a lawyer-driven conspiracy and on the charges of a seven-hospital conspiracy. The district court's conditional new trial order rested on its finding that these two variances prejudiced Mr. McClatchey's right to a fair trial in light of the government's weak case and its improper closing arguments encouraging the jury to consider the dismissed charges as evidence of Mr. McClatchey's guilt.[2]

The government appealed both district court rulings concerning Mr. McClatchey to the Tenth Circuit. Mr. McClatchey's response on appeal focused on the sufficiency of the evidence and the prejudice caused by the two variances. The "one purpose" instruction and the co-conspirator hearsay issue were raised merely as alternative grounds for affirming the conditional new trial order (in order to avoid any waiver issue since the district court had actually ruled these issues). On the other hand, following their sentencing, defendants Anderson and the LaHues raised the "one purpose" and co-conspirator hearsay issues as their primary grounds on appeal.

Because the Anderson/LaHue appeal was several months behind the government's appeal in this case, Mr. Anderson moved to consolidate that appeal with this one

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[2] The district court upheld the convictions of Baptist CEO Dan Anderson and the Drs. LaHue. Defendant Ronald Keel was acquitted by the jury on statute of limitations grounds.

to ensure that the "one purpose" and co-conspirator hearsay issues would not be ruled prematurely. The Tenth Circuit denied consolidation. App. 26a. The Tenth Circuit did, however, grant Mr. Anderson leave to file a 20,000 word opening brief on these issues, while Mr. McClatchey's request for additional briefing was denied. App. 21a (n.6), 24a (n.9). Several national and regional organizations – including the American Hospital Association, the National Association of Criminal Defense Lawyers, and the Missouri Hospital Association – were granted leave to appear as *amicus curiae* in the *Anderson* appeal. Thus, unlike the presentation in this case of alternative grounds for affirming the district court, the "one purpose" and co-conspirator hearsay issues were exhaustively briefed in *Anderson*. The *Anderson* appeal was argued September 29, 2000 and is submitted for decision.

On June 13, 2000, the Tenth Circuit reversed both district court orders granting relief to Mr. McClatchey in this case. Agreeing with the district court that there was insufficient evidence for conviction on most of the government's allegations, the Tenth Circuit nonetheless held that Mr. McClatchey's role in the negotiations for the 1993 contract between the hospital and the doctors' medical group was sufficient to allow a reasonable jury to infer that Mr. McClatchey joined a conspiracy with criminal intent to induce patient referrals through the contract. App. 10a-13a. As to the new trial order based on material variance, the Tenth Circuit held that *de novo* review was appropriate. The Tenth Circuit agreed with the district court that there were two material variances between the indictment and the government's actual evidence, but concluded under its *de novo* review that Mr. McClatchey was not substantially prejudiced. App. 13a-20a.

Further, the Tenth Circuit ruled on the "one purpose" and co-conspirator hearsay issues, raised alternatively in Mr. McClatchey's appeal, rather than deferring its ruling

pending a complete presentation of these issues in the related *Anderson* appeal. The Tenth Circuit affirmed the district court's use of the "one purpose" instruction, holding that one violates the Medicare Anti-Kickback statute if "one purpose of the offer or payment is to induce Medicare or Medicaid patient referrals." App. 24a. As to the documentary evidence admitted pursuant to Fed. R. Evid. 801(d)(2)(E), the Tenth Circuit held that Mr. McClatchey waived this issue by failing to identify the precise documents he contended were wrongfully admitted. App. 24a.

The Tenth Circuit denied rehearing, and denied *en banc* review of the panel decision with four judges dissenting. App. 128a.

REASONS FOR GRANTING THE WRIT

Mr. McClatchey's petition raises four issues. First, Mr. McClatchey seeks review of the Tenth Circuit's decision to apply a *de novo* standard of review to the district court's new trial order based on prejudicial variance. Second, Mr. McClatchey seeks review of the Tenth Circuit's holding that the "one purpose" test is appropriate for imposing criminal sanctions on health care providers under the Medicare Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b). Third, Mr. McClatchey is asking the Court to determine whether the standard for criminal liability can be met with documentary evidence authored by lawyers who have been acquitted, or otherwise exonerated, under an expansive "joint venture" view of Fed. R. Evid. 801(d)(2)(E). Finally, Mr. McClatchey is asking the Court to exercise its supervisory authority and correct substantial procedural errors made in the Tenth Circuit's premature resolution of the government's appeal of the

acquittal and new trial order in this case. All are questions of first impression in this Court.[3]

A. *De Novo* Review Of The District Court's New Trial Order

The first question presented is whether the Tenth Circuit erred in adopting and applying a *de novo* standard of review of the district court's order conditionally granting Mr. McClatchey a new trial. No circuit has adopted a pure *de novo* standard for reviewing a district court's determination that trial defects created "prejudice" sufficient to order a new trial. It is respectfully submitted that, in adopting this standard, the Tenth Circuit ignored its own precedent, created a conflict among other circuits, overstepped the appropriate role of an appellate court, and rendered superfluous the new trial remedy provided by Fed. R. Crim. P. 33.

Sup. Ct. R. 10(a) provides that Supreme Court review may be granted where the federal appellate court's procedure "so far departed from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of [the] Court's supervisory powers." This case calls for an exercise of this Court's power and responsibility to remind federal appellate courts of the necessary limits of their review authority. The same rule provides that review is appropriate where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." *Id.* Here, the Tenth Circuit's adoption of a *de novo* standard conflicts with *United States v. Camiel*, 689 F.2d 31, 37-40 (3d Cir. 1982), which is not even cited in the opinion below. The

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[3] Further, the "one purpose" and co-conspirator hearsay issues are presently before the Tenth Circuit in *United States v. Anderson, et al.*, Nos. 99-3347, 99-3344 and 99-3352.

Third Circuit in *Camiel* held that the variance issue required a mixed standard of view in which the legal precepts of the prejudice analysis are reviewed *de novo*, but the existence of prejudice based on the narrative facts of what happened at trial is reviewed only for abuse of discretion. *Camiel*, 689 F.2d at 37-38.

Fed. R. Crim. P. 33 authorizes the district court to grant a new trial "in the interests of justice." The district court's new trial order was based on two material variances ("lawyer" variance and "other hospitals" variance) between the indictment and the government's actual evidence, and the substantial prejudice to Mr. McClatchey's right to a fair trial. Because of the exceedingly weak evidence against Mr. McClatchey and the government's closing argument urging the jury to draw adverse inferences from the evidence concerning the lawyers and the other hospitals – evidence which the district court had ruled to be unreasonable as a matter of law in acquitting the two lawyer defendants and dismissing all charges against Mr. McClatchey involving hospitals other than Baptist – the district court found that prejudice had occurred. App. 32a, 73a. The district court was in the best position to assess whether Mr. McClatchey was prejudiced, having presided over a nine week jury trial, and was in the best position to analyze the fairness of the proceeding based on its first-hand courtroom observations.

Courts reviewing a district court's assessment of whether the trial process has been prejudicially tainted, including the Tenth Circuit prior to this case, have consistently held that the proper standard of review under Fed. R. Crim. P. 33 is whether the district court abused its discretion. *See, e.g., Zafiro v. United States*, 506 U.S. 534 (1993) (prejudice in severance analysis is subject to abuse of discretion review); *United States v. Custodio*, 141 F.3d 965, 966 (10th Cir.), *cert. denied*, 119 S. Ct. 243 (1998); *United States v. Wood*, 958 F.2d 963, 966 (10th Cir. 1992);

United States v. Reed, 887 F.2d 1398, 1402 n.5 (11th Cir. 1989); *United States v. McBride*, 862 F.2d 1316, 1319 (8th Cir. 1988); *see also United States v. Camiel*, 689 F.2d at 37-40 (mixed standard of review on prejudicial variance). By second-guessing, *de novo*, the district court's factual determination of prejudice, the Tenth Circuit ignored its own precedent and exceeded its authority. The Court did not even acknowledge the "interests of justice" standard under Fed. R. Crim. P. 33; rather, it relied on *United States v. Morris*, 700 F.2d 427, 430 (1st Cir. 1983), a non-binding case which offers no authority for the specific issue presented. Further, by ignoring the "strength of the evidence" factor of the prejudice analysis, *United States v. Edwards*, 69 F.3d 419, 432-33 (10th Cir. 1995), the court effectively required Mr. McClatchey to prove he is entitled to an acquittal for insufficient evidence, a standard that eviscerates the new trial remedy in the "interests of justice" under Fed. R. Crim. P. 33.

The Tenth Circuit's decision is an unwarranted departure from the standard this Court and other federal courts have applied in reviewing a district court's factual determination of prejudice under Fed. R. Crim. P. 33. The decision will discourage district judges from giving careful consideration to new trial motions based on material variance and will authorize courts of appeals to disregard factual conclusions drawn by those who have personally observed and seen the witnesses. Because the standard of review applied is often outcome-determinative and because there is a conflict among the circuits, *see Camiel*, 689 F.3d at 37-40, Mr. McClatchey is asking the Court to grant review, correct the Tenth Circuit's misapplication of Fed. R. Crim. P. 33, and remind federal appellate courts of the necessary limits on their power and responsibility. *See, e.g., Dickinson v. Zurko*, 527 U.S. 150 (1999) (granting certiorari to determine appropriate standard of review of factual findings of Patent and Trademark Office); *General Electric Co., et al. v. Joiner*, 522 U.S. 136 (1997) (granting

certiorari to determine proper standard of review of a district court's decision concerning the admissibility of expert testimony); *Greene v. Gear*, 519 U.S. 145 (1996) (granting certiorari to determine appropriate standard of review of state trial court's findings of fact concerning juror bias); *Firestone Tire & Rubber Co., et al. v. Branch, et al.*, 489 U.S. 101 (1989) (granting certiorari to resolve conflict concerning proper standard of review under ERISA).

B. The "One Purpose" Test

The second question presented is whether the Tenth Circuit erred in adopting the "one purpose" test under the Medicare Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b), by which a jury may convict a health care provider of a felony if any part of a health care business relationship contemplates possible patient referrals. This is an issue of exceptional importance, as evidenced by the numerous briefs filed *amicus curiae* in the related case of *United States v. Anderson, et al.* In the face of increased government efforts to crack down on perceived abuse in the nation's health care system, this case presents an issue on which guidance is needed, as the lower courts have taken different approaches to the critical element of "inducement" under the statute.

The Medicare Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b), as applicable here, prohibits payment of "remuneration" to a physician "to induce" the referral of patients whose hospital care is paid with federal funds, with specific intent to violate the law. Mr. McClatchey's primary defense was that he never "knowingly and willfully" joined a conspiracy to violate the Medicare Anti-Kickback statute. He did not establish the relationship between Baptist and the LaHues, nor was he responsible for day to day contract oversight. App. 3a-4a, 40a. Each time he had any contact with the relationship over the

years it existed, his intent was to keep the relationship legitimate and to refer any questions to the hospital's legal counsel. App. 65a-66a. His negotiating role for the 1993 contract was directed at all times by legal counsel. *Id.* Nonetheless, the jury was instructed to convict if it found that "one purpose" of Mr. McClatchey's involvement in the arrangement was to cause patient referrals, App. 69a, despite the facts that the nursing home patients received quality care at Baptist, that there was no overtreatment or overutilization of services, and that patient choice was respected. App. 35a-36a.

In acquitting the attorney defendants during trial, in an order not appealable by the government, the district court held that no reasonable jury could find that the attorneys acted with criminal intent. In acquitting Mr. McClatchey post-verdict, the order appealed by the government and reversed by the Tenth Circuit, the district court similarly held that Mr. McClatchey's situation was no different from the attorneys and that no reasonable jury could find otherwise. The Tenth Circuit reversed this acquittal (and the conditioned new trial order), holding that as to a single matter – the 1993 contract – the jury might have believed that Mr. McClatchey's role in negotiating that contract under the guidance of the attorneys was motivated, in the language of the jury instruction, "at least in part" to induce continued patient referrals from the doctors. App. 24a.

The Tenth Circuit thus followed *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985), in which the Third Circuit interpreted the "inducement" element of the statute to allow a jury to convict a health care provider of a felony if "one purpose" of a health care business relationship contemplates possible patient referrals. App. 24a. Specifically, in reversing the district court's judgment of acquittal, the Tenth Circuit court stated that, even though the 1993 contract "appears to encompass a legal arrangement," the jury might reasonably have inferred that Mr.

McClatchey would not have been involved "absent his intent to induce the LaHues to continue referring their patients to Baptist." App. 10a. However, congressional, administrative, and judicial developments since *Greber*, not recognized by the Tenth Circuit, show that *Greber* does not provide the definitive interpretation of the statute, and that clarification by this Court is needed, just as the Court provided in *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999).

1. The Medicare Anti-Kickback statute provides that one who "knowingly and willfully offers or pays any remuneration . . . to any person to induce such person" to refer patients is guilty of a felony. *See* 42 U.S.C. § 1320a-7b(b)(2). Significantly, the text of the statute does not address remunerations offered or paid for multiple purposes, including patient referrals. As the plain language of the statute is ambiguous, the statute must be interpreted to comport with congressional intent. *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991).

A review of the legislative history and purpose of the Medicare Anti-Kickback statute reveals that the "one purpose" rule is an erroneous interpretation of the inducement element of the statute. The statute was adopted to criminalize business relationships between health care providers causing overspending of federal health care funds, impairment of patient choice, and decreased quality of patient care, none of which were present in this case. *See, e.g.*, 63 Fed. Reg. 1659, 1662 (Jan. 9, 1998). It was never Congress' intent to sanction relationships that did not implicate these concerns, as is evidenced by Congress' response to *Greber*.

2. After the *Greber* decision was issued, Congress worried that the language of the statute, read literally, criminalized "many relatively innocuous, or even beneficial, commercial arrangements" it was not intended to cover. 54 Fed. Reg. 3088 (Jan. 23, 1989); *see* H. Rep. No. 100-85, at 27 (May 7, 1987); S. Rep. No. 100-109, at 27 (July

14, 1987). To deter an overly broad interpretation of the statute, Congress directed the Secretary of Health and Human Services (collectively "HHS") to promulgate "safe harbor" regulations specifying practices that could involve remuneration and patient referrals but would not violate the statute because of their beneficial impact on the quality or cost of health care. Thus, Congress recognized that *Greber* was an overly broad interpretation of the statute and that there may and will be legitimate business relationships between health care providers in which the "one purpose" of patient referrals is also contemplated.

Significantly, the list of "safe harbors" was not exclusive. *See* 56 Fed. Reg. 35952, 35954-55 (July 21, 1991) ("[I]t is unfortunately not possible to provide safe harbor protections for all business arrangements that are not abusive."). HHS knew the health care industry would continue to evolve and that innovative participants would create other beneficial relationships involving remuneration and patient referral that would not violate the Anti-Kickback statute. *Id.* The "one purpose" test precludes this possibility. Because the "safe harbors" are not exclusive, the *Greber* "one purpose" test cannot be appropriate, for *Greber* sanctions any arrangement with patient referrals not expressly protected by the safe harbor provisions.

Further, in 1996, Congress required HHS to issue binding opinions advising concerned health care providers of the legality of their arrangements. Pub. L. No. 104-91, Title II, § 205, 110 Stat. 1936 (Aug. 21, 1996); *see also* H. Rep. No. 104-496, at 84 (1996) (recognizing that safe harbor provisions were "insufficient"). The advisory opinions issued demonstrate that *Greber* is wrong because the HHS found that relationships involving patient referrals were not illegal. The opinions approve programs that contemplate patient referrals "at least in part" because

the programs are accepted within the industry and beneficial to patients and the Medicare system. *See, e.g,* HHS Advisory Op. No. 99-9 (Oct. 7, 1999); HHS Advisory Op. No. 98-19 (Dec. 14, 1998); HHS Advisory Op. No. 98-13 (Sept. 23, 1998); HHS Advisory Op. No. 98-12 (Sept. 16, 1998). HHS did not sanction relationships merely because they were motivated "at least in part" by patient referrals; rather, the relationships at issue were evaluated in light of Medicare goals and the evils Congress intended to proscribe. *See id.* Under the "one purpose" rule, however, the arrangements specifically approved by the HHS would otherwise violate the statute.

3. A "primary purpose" test is more consistent with original congressional intent and with the modern realities of the health care business. Under this test, the statute would not be violated unless the primary purpose of a particular remuneration is to induce patient referrals. This is the type of "inducement" Congress intended to sanction, and it is the only *mens rea* likely to cause the evils of overspending, poor quality, impairment of choice, and decreased competition which Congress sought to prevent. The First Circuit summarized as follows:

> The key to a Medicare Fraud case is the reason for the payment – was the purpose of the payments *primarily* for inducement. In addition to the knowing and willful requirement, this imposes a second and stronger scienter requirement. The unusually high scienter requirement mitigate[s] [any] vagueness, especially with respect to the adequacy of notice to the [defendant] that his conduct is proscribed.

United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 33 (1st Cir. 1989) (emphasis added) (citations omitted).

While the Third Circuit in *Greber* and Tenth Circuit in this case adopted the "one purpose" test, the inducement element of the statute has not been interpreted in many

circuits, and other courts addressing the issue taken divergent approaches to the statutory analysis. In *Bay State*, the First Circuit, in reviewing a "primary purpose" jury instruction, declined wholesale endorsement of the *Greber* "one purpose" rule, stating: "At a minimum this ['primary purpose' instruction] comports with congressional intent." *Bay State*, 874 F.2d at 30. The Ninth Circuit in *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989), also considered the "one purpose" rule, but approved a jury instruction that required proof of a "material purpose." *Id.* at 108. Moreover, in *Hanlester Network v. Shalala*, 51 F.3d 1390, 1399 (9th Cir. 1995), the Ninth Circuit held that the Anti-Kickback statute was not violated by an arrangement between health care joint venture participants intended to encourage patient referrals.

While the "one purpose" standard precludes consideration of other relevant factors, the "primary purpose" test enables the trier of fact to give appropriate consideration to all factors motivating a particular arrangement, including those found here: 1) excellent programs which provide quality patient care; 2) consistency with Medicare policies; 3) cost savings for the system as a whole; 4) avoiding overtreatment of patients and overutilization of program funds; and 5) access to care to those previously excluded. Mr. McClatchey's case is a striking example of the dangers of the "one purpose" rule. The district court found:

> [T]here was no evidence at trial that the referred patients received substandard care at Baptist. To the contrary, Baptist came to be widely recognized as a premier provider of gerontology services. There was also no evidence at trial that the referral relationship affected patient choice. To the contrary, where patients or their families expressed a hospital preference, BMVG worked to honor the request. There was, moreover, no evidence at trial that any patient received

> unnecessary services. To the contrary, witness after witness testified that the BVMG/Baptist patient referral system had appropriate checks and balances to guard against such abuses.

App. 35a-36a. It is significant that the district court found that the evidence was insufficient to sustain Mr. McClatchey's conviction and the Tenth Circuit merely concluded there was a dispute and the jury might have reasonably inferred Mr. McClatchey's actions in helping with legal counsel to negotiate a single contract were motivated, "at least in part," by patient referrals. Thus, even in a case where the evidence of inducement was, at best, *de minimis* and where patients and the system benefited from the Baptist-LaHue relationship, the "one purpose" instruction gave the jury little choice but to convict. This is the stark reality of *Greber*. Not only was *Greber* wrongly decided, the "one purpose" standard is inapplicable in today's health care environment, as Congress has recognized. This Court should accept review in this case to clarify this statute and thus provide needed guidelines for the law enforcement and health care communities who must deal with the statute every day.

The rationale of *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999), supports adoption of a "primary purpose" standard for the statute involved here. In a complex regulatory environment, as here, courts must resist broad interpretations of criminal statutes. *See id.* at 406-12. In *Sun-Diamond*, the Court held that ambiguous criminal statutes should be construed in accordance with the more narrow interpretation to avoid the "peculiar results" of a broad reading that would sanction seemingly innocuous conduct. *See id.* at 406-08. The Court stated that "a statute that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be interpreted to be the latter." *Id.* at 412. The district court

declined to follow the teachings of *Sun-Diamond* and concluded that the Medicare Anti-Kickback statute was a "meat axe," App. 87a (n.25), but it is submitted that this was not necessarily required but for *Greber*. The Tenth Circuit did not even cite *Sun-Diamond*.

4. The health care and academic communities have argued that *Greber* was an erroneous, overly broad interpretation of the Anti-Kickback statute. *See, e.g.*, Denise Rogriguez & Richard A. Baker, Health Care Law Newsletter, *Recent Developments in Medicare and Medicaid Fraud & Abuse* 12, 14 (July 1989); Gregory P. Miller, *Medicare Fraud & Abuse: Understanding the Law, The* Greber *Case* 16-17 (J. Johnson ed., 1986). The "one purpose" test criminalizes normal business practices of hospitals and other health care providers that ultimately improve the quality and availability of patient care and save the system money. *See* David M. Frankford, *Creating & Dividing the Fruits of Collective Economic Activity: Referrals Among Health Care Providers*, 89 Colum. L. Rev. 1861, 1909 & nn. 173-74 (1989). *See generally* Marcia Pollard & Grace J. Wigal, *Hospital Staff Privileges: What Every Health Care Practitioner & Lawyer Needs to Know* 1 (1996). Health care and academic commentators further opine that the "one purpose" test will stifle innovation as the health care system evolves, for providers are precluded from exploring otherwise innovative relationships if they involve an element of patient referral. *See, e.g.*, William Kucera, Hanlester Network v. Shalala: *A Model Approach to the Medicare and Medicaid Kickback Problem*, 91 Nw. U.L. Rev. 413, 446 (1996).

The "one purpose" test converts the Anti-Kickback statute into a prohibition against all arrangements that remotely contemplate patient referrals, regardless of whether the system has been abused, regardless of whether quality care is provided, and despite the primary

motivations of the participants. *See* James F. Blumstein, *The Fraud & Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy*, 22 Am. J. Law & Medicine 205 (1996). All relationships between health care providers have "at least" some element of patient referrals, as hospitals and doctors exist to treat patients. Yet, patient referrals can and do coexist with improved quality and availability without any abuse of the Medicare system. If *Greber* is the law, however, every relationship between providers is unlawful unless it falls within a specific "safe harbor" or has been expressly approved by the HHS. This could not have been Congress' intent.

5. No court since *Greber* had actually adopted wholesale the "one purpose" test, until the Tenth Circuit's decision in this case. While there is not really a true "conflict" among the circuits, there are varying approaches to a federal law on which a uniform, clear standard is needed to guide health care providers in the conduct of their daily business relationships. The ambiguity of the statute and the divergence of judicial opinion on an issue fundamental to the regulation of the health care industry warrants this Court's review. *See, e.g, Gordon v. New York Stock Exchange*, 422 U.S. 659, 663 (1975) (granting certiorari "[b]ecause of the vital importance of the question"); *American Fed. of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (granting certiorari because petition raised "an important [issue] of first impression" concerning the proper interpretation of a federal statute); *see also Laing v. United States*, 423 U.S. 161, 167 (1976) (granting certiorari where question presented was novel and was at issue in numerous lower courts, thereby rendering desirable an early and definitive ruling by the Supreme Court).

C. Co-Conspirator Hearsay

The third question presented is whether documentary evidence authored by lawyers who have been acquitted, unindicted or otherwise exonerated may be used to convict a health care provider of violating the Anti-Kickback statute under an expansive view of Fed. R. Evid. 801(d)(2)(E), a substantial question concerning the proper scope of the co-conspirator hearsay rule.

The Tenth Circuit erred in holding that Mr. McClatchey waived the co-conspirator hearsay issue. First, the evidence in question was documentary, and Mr. McClatchey identified generally the documents that he contended were improperly admitted. All of these documents were before the Tenth Circuit in the government's appendix. Second, Mr. McClatchey identified the place in the record where his objection to this evidence was ruled by the district court as required by 10th Cir. R. 10.3(D)(1) and 28.2(C)(2)-(3). Third, to facilitate the Tenth Circuit's review, the government identified the specific exhibits in its reply brief.[4] The Tenth Circuit "waiver" ruling was an erroneous attempt to avoid appellate review of an important and potentially dispositive issue.

The district court admitted more than 60 documents authored by lawyers who were either acquitted or were expressly found not to have been co-conspirators, holding that the declarants need only be "participants" in a "joint venture" or "common plan" for the documents to be admissible against Mr. McClatchey and the other

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[4] Moreover, all of the documents were specifically identified and analyzed in more detail in the *Anderson* appeal and are currently under review by the Tenth Circuit in that case. Mr. McClatchey was effectively and unfairly blind-sided by the Tenth Circuit's premature ruling of the hearsay issue on this appeal. *See infra* Section D.

defendants under Fed. R. Evid. 801(d)(2)(E). App. 97a, 109a. Thus, the court found that the admission of co-conspirator hearsay does not require that the declarant be a co-conspirator or have participated in the conspiracy, effectively allowing the wholesale admission of statements by anyone engaged in a common pursuit or innocent association with the defendant. It is respectfully submitted that the holding below is an unjustified extension of the co-conspirator hearsay rule which disregards the express language of Fed. R. Evid. 801(d)(2)(E) and the weight of conflicting precedent.

The district court followed the Ninth Circuit's decision in *United States v. Layton*, 855 F.2d 1388, 1398 (9th Cir. 1988), which held that Fed. R. Evid. 801(d)(2)(E) applies to statements made during the course and in furtherance of any enterprise, legal or illegal, in which the declarant and the defendant jointly participated. *Id.* at 1400. Other circuits have either held or indicated that hearsay statements made as part of an innocent joint venture are admissible under Fed. R. Evid. 801(d)(2)(E). *See United States v. Saimiento-Rozo*, 676 F.2d 146 (5th Cir. 1982); *United States v. Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981). However, the "joint venture" theory represents an unduly expansive view of the admissibility of co-conspirator hearsay.

The language of Fed. R. Evid. 801(d)(2)(E) plainly requires that the statement be made "during the course" and "in furtherance" of a conspiracy, as co-conspirator statements "derive [their] significance from the circumstances in which [they are] made." *United States v. Inadi*, 475 U.S. 387, 394-95 (1986) (recognizing co-conspirators speak freely to further their illegal aims). The rule was intended to apply to illegal conspiracies. *See* Fed. R. Evid. 801(d)(2)(E) advisory committee notes; *United States v. Beckham*, 968 F.2d 47, 51 (D.C. Cir. 1992); *United States v.*

Mayberry, 896 F.2d 1117, 1120 (8th Cir. 1990); *United States v. Garcia-Durate*, 718 F.2d 42, 45 (2d Cir. 1983). If the declarant is not a co-conspirator but is merely engaged in some "joint enterprise" with the defendant, then the rationale of the co-conspirator hearsay rule should not apply as the statements no longer have sufficient indicia of reliability to be admissible.

For hearsay statements to be admissible under Fed. R. Evid. 801(d)(2)(E), the government must show that 1) a conspiracy existed; 2) both the declarant and the defendant against whom the statement is offered were members of the conspiracy; and 3) the statements were made during the course and in furtherance of the conspiracy. *See, e.g., United States v. Roberts*, 14 F.3d 502 (10th Cir. 1993). By following the Ninth Circuit's "joint venture" theory, the district court ignored the language of the rule and precedent requiring that the declarant be a co-conspirator and that the statements be made during the course and in furtherance of a conspiracy. *See, e.g., United States v. Williamson*, 53 F.3d 1500, 1519 (10th Cir. 1995); *United States v. Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969); *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968); *see also White v. Illinois*, 502 U.S. 346 (1992). Further, the "joint venture" theory conflicts with the Court's decision in *Krulewitch v. United States*, 336 U.S. 440 (1949), which rejected the admissibility of statements made after a conspiracy as part of an "implied agreement" to conceal criminal conduct because the Court recognized that the statements must be made as part of an unlawful conspiracy. *Layton*, on the other hand, opens the door to wholesale admissibility of all kinds of hearsay statements regardless of whether a conspiracy existed.

This issue is worthy of the Court's review because the holding below directly conflicts with the language of

Fed. R. Evid. 801(d)(2)(E) and there are divergent views among lower federal courts concerning the applicability of the "joint venture" theory under the co-conspirator hearsay rule. Therefore, this case presents a substantial issue concerning the proper scope of Fed. R. Evid. 801(d)(2)(E). *See Hickman v. Taylor*, 329 U.S. 495 (1947) (granting certiorari to address proper construction of federal rules); *see also Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (granting certiorari to correct obviously incorrect application of federal law); *New York Transit Auth. v. Beazer*, 440 U.S. 568, 571 (1979) (granting certiorari based on erroneousness of decision concerning important issue).

D. The Premature Rulings

The fourth question presented is whether the Court should exercise its supervisory authority over lower federal courts to review the Tenth Circuit's procedure in this case. *See* S. Ct. R. 10(a). Specifically, the petition seeks review of the Tenth Circuit's decision to rule the "one purpose" and hearsay questions without deferring its determination until the issues were fully presented, as the court previously ordered in *United States v. Anderson, et al.*, Nos. 99-3347, 99-3344, 99-3352 (10th Cir.).

Mr. McClatchey raised the "one purpose" jury instruction and admission of alleged co-conspirator hearsay issues as alternative grounds on which the district court's new trial order could be affirmed. However, these two issues are the principal points in the related appeal in *Anderson*, who moved to consolidate his appeal with Mr. McClatchey's appeal to avoid a premature decision on these issues. App. 26a. In opposing consolidation, the government contended that there was no risk of a premature decision in Mr. McClatchey's case because the Tenth Circuit would not rule issues that, in the government's

view, would be more properly raised in a later post-sentencing appeal. Mr. McClatchey also opposed consolidation due to its inherent delay, asserting that, if these issues needed to be reached, the court could simply defer decision until submission of the *Anderson* appeal.

On March 13, 2000, the Tenth Circuit denied consolidation, effectively assuring all parties that the "one purpose" and co-conspirator hearsay issues would not be ruled prematurely. App. 26a. Further, the court granted Mr. Anderson leave to file an opening brief containing up to 20,000 words, but denied Mr. McClatchey's request for additional briefing. App. 21a (n.6), 24a (n.9). Several national and regional organizations were granted leave to appear as *amicus curiae* in the *Anderson* appeal. Thus, the "one purpose" and hearsay issues were exhaustively briefed in *Anderson*, while Mr. McClatchey was not allowed to present substantial briefing on these issues. By its rulings, the Tenth Circuit led all parties to believe that, if reached, these issues of first impression in that Court and of national interest would not be decided in Mr. McClatchey's appeal but would be deferred for a more complete review and ruling in *Anderson*. The *Anderson* appeal, as noted earlier, was argued on September 29, 2000 and remains pending before the Tenth Circuit.

Nonetheless, the Tenth Circuit ruled the "one purpose" and hearsay issues in this case and ignored the more complete presentation the court had previously ordered in *Anderson*. The court erroneously and unfairly ignored the relationship between this case and the *Anderson* appeal and disregarded the reasonable effect of its prior ruling. The court blind-sided Mr. McClatchey in holding that the hearsay issue was inadequately presented, despite having the specific documents before it in the government's appendix and a full presentation of the issue in the *Anderson* appeal. In prematurely ruling the

issues in Mr. McClatchey's appeal, the court's procedure was fundamentally unfair and substantially prejudiced Mr. McClatchey's ability to present fully the "one purpose" and hearsay issues for the court's consideration.[5]

The possibility that the Court will exercise its discretion and use its supervisory authority to review the procedure of lower federal courts is a vital check in our judicial system. Mr. McClatchey respectfully requests that the Court review significant questions concerning the fairness and propriety of the Tenth Circuit's procedure in this case. *See McNabb v. United States*, 318 U.S. 332 (1943); *see also Florida v. Rodriquez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation.").

The Court should consider deferring a ruling on Mr. McClatchey's petition until the *Anderson* appeal is resolved. The Tenth Circuit may reconsider the "one purpose" and co-conspirator hearsay issues based on the more complete presentation ordered in *Anderson*. If so, the Court's grant, vacate and remand procedure ("GVR") could be appropriate.

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[5] As the district court had ruled on these issues, Mr. McClatchey raised the alternative "one purpose" and hearsay issues as a precautionary matter to ensure that there would be no waiver. *Cf. United States v. Boyd*, 958 F.2d 247, 249-50 (8th Cir. 1992) (jury instruction issues would be reviewed in second appeal from judgment after remand from reversal of prior acquittal, but only because the issues had not been ruled by the district court at the time of the first appeal); *see also United States v. Duran*, 127 F.3d 911, 915 (10th Cir. 1997); *United States v. Marietta*, 646 F.2d 729, 734 (2d Cir. 1981).

The process for determining whether to invoke the GVR process is set forth in *Lawrence v. Chater*, ___ U.S. ___, 116 S. Ct. 604 (1996):

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Id. at 607. Because "such a redetermination would determine the ultimate outcome of [this] litigation," *Lawrence*, 116 S. Ct. at 607, the Court should defer ruling this petition pending the Tenth Circuit's decision in *Anderson*.

If the Tenth Circuit rules in favor of the *Anderson* defendants on the "one purpose" and/or co-conspirator hearsay issues, the Court should grant certiorari to Mr. McClatchey, vacate the Tenth Circuit's judgment in this case and remand for reconsideration in light of the Tenth Circuit's new ruling, as the Tenth Circuit's decision would control the outcome of this case. *See, e.g., Schmidt v. Espy*, 513 U.S. 801 (1994); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946). If the Tenth Circuit does not reach a different conclusion in *Anderson*, those defendants will undoubtedly seek review in this Court of the same issues presented here. Thus, deferring a ruling may be an appropriate procedure.

CONCLUSION

For the foregoing reasons, petitioner Dennis L. McClatchey respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,	)	
v.	)	No. 99-3274
DENNIS McCLATCHEY, Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 98-CR-20030)

(Filed Jun. 13, 2000)

Tanya J. Treadway, Assistant United States Attorney, (Jackie N. Williams, United States Attorney, Topeka, Kansas, and William H. Bowne, Criminal Division, Fraud Section, Department of Justice, Washington, D. C., with her on the briefs) for Appellant.

Charles W. German, of Rouse, Hendricks, German, May P.C., Kansas City, Missouri, (Scott M. Brinkman with him on the brief) for Appellee.

Before **BALDOCK, McWILLIAMS,** and **MURPHY,** Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

After a jury convicted Dennis McClatchey of one count of conspiracy and one count of violating the Medicare Antikickback Act (the "Act"), the district court granted McClatchey's motion for acquittal on both charges. The district court concluded there was insufficient evidence from which a reasonable jury could find McClatchey had a specific intent to violate the Act. Additionally, the district court ruled in the alternative that McClatchey would be entitled to a new trial based on prejudicial variances between the indictment and the case presented to the jury. The government appeals both the judgment of acquittal and the alternative grant of a new trial. Exercising jurisdiction[1] pursuant to 28 U.S.C. § 1291

[1] McClatchey contends this court lacks jurisdiction to decide this appeal because the government's notice of appeal specified the document being appealed from as the district court's memorandum and order of July 21, 1999, whereas the jurisdictional statement in the government's brief seeks review of the final judgment entered on July 22, 1999. McClatchey argues this insufficient notice violates Federal Rule of Appellate Procedure 3, thus depriving this court of jurisdiction. This court reads the government's jurisdictional statement differently, however, interpreting it as seeking review of the very July 21 order referenced in its notice of appeal. Moreover, McClatchey concedes that he was not misled as to the issues being appealed. In *Bohn v. Park City Group, Inc.*, this court noted that we liberally construe Rule 3 requirements and held that because the appellee "had clear notice of the issue being appealed and [thus would] not be prejudiced" by the alleged Rule 3 deficiency, the court

and 18 U.S.C. § 3731, this court reverses both rulings. We also reject McClatchey's two further arguments for affirming the district court's grant of a new trial – that the district court improperly instructed the jury it could convict McClatchey if remuneration was paid "at least in part" to induce patient referrals and that the court erred in receiving certain evidence.

II. BACKGROUND

In 1984, Doctors Robert and Ronald LaHue served as the principals in Blue Valley Medical Group ("BVMG"), a specialized medical practice which provided care to patients in nursing homes and other residential care facilities. That year, the LaHues approached defendant Ronald Keel, an operations Vice President at Baptist Medical Center ("Baptist"), and proposed moving their patients from the hospitals they were currently using to Baptist in exchange for Baptist's purchase of BVMG. Keel brought this proposal to the attention of defendant Dan Anderson, the Chief Executive Officer of Baptist, and then to the rest of Baptist's administrative staff, which included McClatchey, Baptist's Chief Operating Officer. Gerard Probst, Baptist's Chief Financial Officer, testified that he discussed with McClatchey the notion that a relationship with the LaHues would result in the LaHues' "bringing their patients to Baptist" and that McClatchey "support[ed] the idea" of establishing such a relationship.

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had jurisdiction. 94 F.3d 1457, 1460 (10th Cir. 1996). Pursuant to *Bohn*, therefore, this court has jurisdiction over the government's appeal.

Although Baptist decided not to purchase BVMG, in January of 1985, Baptist entered into a one-year agreement (the "1985 contract") with the LaHues to pay each doctor $75,000 per year to act as Co-Directors of Gerontology Services at Baptist. According to Probst's testimony, the negotiation over the 1985 contract occurred in a "backwards" manner, with the parties first establishing a fee and only then agreeing to services which the LaHues would provide. The LaHues then began referring their nursing home patients who required hospital care to Baptist.

In the summer of 1985, at the request of the LaHues, Anderson assigned Baptist employee Tom Eckard the job of serving as a liaison between BVMG and Baptist. Although Eckard's official title was Director of Geriatric Services for Baptist, Eckard worked at BVMG and effectively acted as BVMG's manager. Moreover, Baptist rather than BVMG always paid Eckard's salary. Eckard served in this capacity for approximately eight years, and he testified at trial that his primary responsibility was "to keep the relationship [between Baptist and BVMG] positive." Eckard also testified that during the first year of Baptist's contractual relationship with the LaHues, he observed the LaHues provide "minimal to no[]" services to Baptist.

In June of 1986, Baptist entered into a new one-year agreement (the "1986 contract") with the LaHues, again paying each doctor $75,000 per year to provide various services to Baptist. Although the 1986 contract technically expired after one year, Baptist continued to pay the

LaHues their $75,000 per year fee beyond the summer of 1987.[2]

In March of 1991, Baptist merged with Health Midwest. As a result, Baptist's new legal counsel reviewed its contracts with doctors and doctors' groups, including the 1986 contract with the LaHues. That summer, defendant Mark Thompson, one of the attorneys performing this due diligence review, began discussing with McClatchey and other Baptist executives a way of drafting a new contract with the LaHues to bring the contractual relationship within safe harbor regulations which recently had been promulgated by the Health and Human Services Office of Inspector General. From the summer of 1991 until April of 1993, when a new contract was finally executed (the "1993 contract"), McClatchey oversaw the negotiations between Baptist and the LaHues. Although Keel initially served as Baptist's direct contact person with the LaHues in the negotiation process, McClatchey placed Kevin McGrath in that role in late 1991.

From December 1991 through April 1993, Thompson produced no less than eleven drafts of an agreement. According to McGrath, he and McClatchey would instruct Thompson as to what services he should include in the contract. The first five drafts each included a provision which required the LaHues to perform a minimum number of hours of services for Baptist. After the LaHues informed McClatchey, McGrath, and Thompson that they would not accept a minimum hour requirement,

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[2] Baptist paid the LaHues $75,000 per year from 1985 through 1993, with the exception that the LaHues only received $68,750 each in 1990.

that provision was dropped from all further drafts, including the 1993 contract ultimately executed.

Additionally, in late 1991 or early 1992, McClatchey and McGrath learned that the LaHues had not been performing some of the services specified in the 1986 contract and that certain staff members at Baptist were not interested in having the LaHues perform such services. As a consequence, McClatchey, McGrath, and Thompson discussed the concern that the LaHues were not performing sufficient services to justify the fees which Baptist was paying them. On November 5, 1992, an FBI Agent and Medicaid Fraud Investigator visited Baptist and spoke with McClatchey and Anderson about the hospital's relationship with BVMG. As a result, Baptist retained a Baltimore law firm to represent it in the federal investigation and any resulting proceedings. At some point, McClatchey, McGrath, and Anderson talked about terminating Baptist's relationship with BVMG and the LaHues, but they ultimately decided to renegotiate the contract instead.

In October of 1993, McClatchey left his position at Baptist to become the Senior Vice President for Corporate Relations at Health Midwest. On November 26, 1993, Robert LaHue wrote a letter to Anderson terminating the 1993 contract because LaHue anticipated selling BVMG to another company. In response, Health Midwest executives, including McClatchey, began discussing a strategy to replace the patients which they expected to lose with the termination of the LaHue relationship. When the BVMG sale did not materialize, however, Baptist once again began negotiating a new contract with BVMG and

the LaHues. Two temporary agreements sustained the payments to the LaHues through June of 1994.

In 1998, a grand jury returned a superseding indictment against seven individual defendants – Anderson, Keel, McClatchey, the LaHues, Thompson, and attorney Ruth Lehr. The indictment charged McClatchey with one count of conspiracy to offer or pay remuneration to the LaHues in exchange for Medicare and Medicaid patient referrals, in violation of 18 U.S.C. § 2 and 42 U.S.C. § 1320a-7b(b)(2)(A), (B), and one substantive count of offering or paying remuneration to the LaHues to induce such referrals, in violation of 42 U.S.C. § 1320a-7b(b)(2)(A), (B).

At the close of the government's case, the district court granted Thompson's and Lehr's (the "attorney defendants") motions for acquittal. The district court further ruled at that time that the government had failed to present sufficient evidence to demonstrate, as the indictment alleged, that any defendant but the LaHues were involved in a conspiracy that extended to six other hospitals in addition to Baptist. The district court thus limited the jury's consideration of all evidence concerning these six other hospitals to only the charges against the LaHues.

The jury returned a guilty verdict on both charges against McClatchey. After the verdict, however, the district court granted McClatchey's motion for judgment of acquittal on both counts, concluding that no reasonable jury could find McClatchey deliberately intended to violate the Act based on the evidence presented at trial. Pursuant to Federal Rule of Criminal Procedure 29(d), the district court ruled alternatively that should its acquittal

decision be overturned, McClatchey would be entitled to a new trial due to prejudicial variances between the case presented at trial and the indictment against him. *See* Fed. R. Crim. P. 29(d) ("If a motion for judgment of acquittal after a verdict of guilty . . . is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed. . . . ").

III. DISCUSSION

A. The District Court's Grant of a Judgment of Acquittal

This court gives no deference to a district court's decision to set aside a jury's guilty verdict and grant a defendant's post-verdict motion for judgment of acquittal. *See United States v. Santistevan*, 39 F.3d 250, 255 (10th Cir. 1994). We review that motion *de novo*, viewing the evidence in a light most favorable to the government to determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *See id.*

In the instant case, the district court granted McClatchey's post-verdict motion on the basis that the evidence presented failed to support a reasonable finding that McClatchey possessed the requisite criminal intent to be convicted on either count. The parties agree that to convict McClatchey of both the conspiracy charge and the substantive charge of violating the Act, the government needed to prove beyond a reasonable doubt that McClatchey knowingly and willfully joined a conspiracy

with the specific intent to violate the Act.[3] A defendant violates the Act when he

> knowingly and willfully offers or pays any remuneration . . . to any person to induce such person . . . to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program. . . .

42 U.S.C. § 1320a-7b(b)(2)(A). In instructing the jury, the district court defined willfulness as follows:

> An act is done willfully if it is done voluntarily and purposely and with the specific intent to do something the law forbids, that is, with the bad purpose either to disobey or disregard the law. A person acts willfully if he or she acts unjustifiably and wrongly while knowing that his or her actions are unjustifiable and wrong. Thus, in order to act willfully as I have defined that term, a person must specifically intend to do something the law forbids, purposely intending to violate the law.

Neither party quarrels with this instruction. This court will therefore affirm the district court's grant of acquittal only if the evidence presented would not permit any

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[3] Although the conspiracy charge submitted to the jury also allowed it to convict McClatchey if it unanimously found he knowingly and willfully entered into an agreement with the purpose of *defrauding the government*, the only issue which the parties present to this court is whether McClatchey knowingly and willfully entered into an agreement with the purpose of offering or paying remuneration to induce Medicare patient referrals.

reasonable jury to find beyond a reasonable doubt that McClatchey knowingly, voluntarily, and purposefully entered into an agreement with the specific intent to offer or pay remuneration to induce the LaHues to refer Medicaid patients to Baptist.[4]

Although the district court correctly concluded that no reasonable jury could find beyond a reasonable doubt that McClatchey specifically intended to violate the Act based on the evidence of his involvement, or non-involvement, in the 1985 contract, the 1986 contract, and the loan of Eckard to BVMG, this court disagrees with the district court's assessment of the evidence concerning McClatchey's negotiation of the 1993 contract. The district court concluded that McClatchey repeatedly acted to insure that the 1993 contract was a legal one. Although it may be true that the 1993 contract appears to encompass a legal arrangement, the evidence supports a reasonable inference that McClatchey would never have supported negotiating and entering into that contract absent his intent to induce the LaHues to continue referring their patients to Baptist.

Specifically, the evidence presented at trial reveals three important aspects of McClatchey's knowledge which inform on his intent. First, well before entering into the 1993 contract, McClatchey knew the LaHues had not performed substantial services required under the

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[4] McClatchey concedes that if the evidence is sufficient to support the jury's verdict on the conspiracy charge, he would also be criminally liable for the substantive count of violating the Act pursuant to *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

prior contracts. The LaHues themselves reported that fact to McClatchey and McGrath in late 1991 or early 1992, and McGrath's subsequent investigation revealed the LaHues were only reporting two hours per week of work at Baptist. Second, McClatchey knew that certain Baptist staff members were not even interested in having the LaHues perform some of these services. McGrath reported to McClatchey that the medical director of the Family Care Residency Program did not want the LaHues teaching residents and that the director of Social Services did not want the LaHues to make nursing home referrals to Baptist patients because her practice had always been to provide families the names of three doctors who could make such referrals. Third, McClatchey understood how important the LaHues' patient referrals were to Baptist's financial health. Eckard even testified that McClatchey placed "substantial emphasis" on Eckard's ability to maximize admissions and profitable outpatient visits to Baptist from BVMG business. Based on this knowledge, a reasonable jury could infer that McClatchey's very reason for negotiating a new contract with the LaHues, rather than terminating the relationship, was to induce them to continue their profitable referrals.

McClatchey makes two arguments against the reasonableness of such an inference. He first contends that his surprise at learning of the failure to provide services and his directive to McGrath and legal counsel to investigate and remedy that situation belies an inference of criminal intent. This argument, however, ignores the further evidence that McClatchey knew the hospital staff did not even want or need some of the services specified in the contract; based on that additional evidence, a jury

could reasonably infer McClatchey did not really care whether the contractual services were needed or performed, but merely that the LaHues continued to refer their patients to Baptist. Given this evidence, a jury could also infer that McClatchey directed McGrath and legal counsel to address the service issue merely to insure that the final contract appeared on its face to constitute a legal arrangement. This possible explanation is supported by the inclusion in the 1993 contract of a provision requiring the LaHues to provide resident instruction, despite McClatchey's knowledge that the head of the residency program did not desire such services.

McClatchey also argues that his actions throughout the negotiation process cannot give rise to an inference of his criminal intent because they were entirely directed and controlled by legal counsel. McGrath testified, however, that he and McClatchey told the lawyers what services to include in the contracts, not visa versa. Thus, the jury could reasonably attribute to McClatchey and McGrath both the decision to remove a minimum hour provision from the contract after the LaHues objected to such a requirement and the inculpatory inference of intent that can be drawn therefrom. Moreover, it was not the attorneys but McClatchey, Anderson, and McGrath who made the important decision to negotiate a new contract rather than ending Baptist's relationship with BVMG. Finally, McClatchey did not always heed the attorneys' advice. For example, although Baltimore attorney Craig Holden stressed the importance of reassigning Tom Eckard to a new job within the hospital and even informed BVMG's attorney that this reassignment would occur by February 1, 1993, McClatchey personally

delayed that move until March 1, 1993. The evidence, therefore, permitted the jury to reasonably reject McClatchey's good faith reliance on counsel defense and instead find he harbored the specific intent to violate the Act.

The evidence concerning McClatchey's involvement in negotiating the 1993 agreement thus gives rise to a reasonable inference that he knowingly, voluntarily, and purposefully entered into an agreement with the specific intent to induce the LaHues to refer their Medicaid patients to Baptist. The district court therefore erred in granting McClatchey's post-verdict motion for a judgment of acquittal.

B. The District Court's Grant of a New Trial

The government also challenges the district court's alternative ruling that McClatchey is entitled to a new trial because the case presented to the jury prejudicially varied from the charges set out in the indictment. McClatchey asserts two further alternative bases for this court to affirm the district court's grant of a new trial: the district court erroneously instructed the jury it could convict McClatchey if remuneration was paid "at least in part" to induce patient referrals; and the district court erred in receiving certain evidence under the co-conspirator non-hearsay rule. This court concludes that the district court's decision to grant McClatchey a new trial was erroneous and rejects his alternative arguments for affirming the ruling.

1. Variance

Whether a variance between an indictment and the case presented at trial is sufficiently prejudicial to warrant a new trial is a question of law. *See United States v. Morris*, 700 F.2d 427, 430 (1st Cir. 1983). This court therefore reviews de novo the district court's decision to grant a new trial on the basis of a prejudicial variance. *See Weese v. Schukman*, 98 F.3d 542, 549 (10th Cir. 1996). "Variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment." *Dunn v. United States*, 442 U.S. 100, 105 (1979). Similarly, a shift in the government's theory from the one set out in the indictment to that presented at trial may also constitute a prejudicial variance. *See United States v. Meyers*, 95 F.3d 1475, 1485 (10th Cir. 1996). A new trial is only necessary, however, if the variance substantially prejudiced the defendant's right to a fair trial. *See United States v. Ailsworth*, 138 F.3d 843, 849 (10th Cir. 1998).

a. The Acquittal of the Attorney Defendants

McClatchey contends the district court correctly concluded a prejudicial variance arose when the district court granted the attorney defendants' motions for judgment of acquittal. He argues that while the indictment alleged McClatchey and the attorney defendants worked in knowing cooperation to craft "sham" contracts that would make Baptist's relationship with the LaHues appear legal, the acquittal of the attorney defendants allowed the jury to convict McClatchey on one of two entirely different theories – either that McClatchey failed to disclose certain information to the attorney defendants

or that he failed to heed their advice. It is this shift in the theory of McClatchey's involvement in the purported conspiracy which he contends constitutes a prejudicial variance.

Even if the theory on which the jury convicted McClatchey did vary from that set out in the indictment,[5] this court fails to see how McClatchey was substantially prejudiced by such a change. McClatchey argues he was prejudiced by this purported variance because allowing the jury to convict him on one of these two allegedly new theories of his involvement eviscerated his good faith reliance on counsel defense. As Instruction 39 demonstrates, however, by raising a good faith reliance defense, McClatchey himself necessarily required the jury to consider whether he made full disclosure to the attorneys and whether he followed their advice. *See Ailsworth*, 138

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[5] It is highly questionable whether this purported theoretical variance even occurred. As McClatchey concedes, after the attorney defendants were dismissed from the case, the government nonetheless continued to argue that the attorneys culpably cooperated with McClatchey and others to draft the "sham" contracts – the precise theory of McClatchey's involvement alleged in the indictment. Moreover, the jury was never told why the attorney defendants were dismissed from the case, and thus, it may well have convicted him on this same theory. Although McClatchey now complains that the government should not have been allowed to argue that the attorney defendants acted with less than lawful intentions, he did not object to the government's argument at trial. Furthermore, McClatchey's contention that the government impermissibly presented to the jury the theory set out in the indictment is strangely at odds with his complaint on appeal that the theory presented to the jury differed from the one alleged in the indictment.

F.3d at 850 ("It's presumed that [the jury] followed those instructions." (quotation omitted)). Instruction 39 states,

> If a defendant, before taking any action, sought the advice of an attorney whom he considered competent, in good faith and for the purpose of securing advice on the lawfulness of his possible future conduct, *and made a full and accurate report to his attorney of all material facts which he knew and acted strictly in accordance with the material advice of his attorneys who had been given a full report*, then the defendant would not be knowingly and willfully doing wrong in doing something the law forbids. . . .

(emphasis added). This court fails to understand how shifting the jury's attention to two allegedly new theories of McClatchey's involvement, which were already part and parcel to his own defense theory, in any way eviscerated that defense. McClatchey presumably understood when he decided to raise a good faith reliance defense that full disclosure and following the attorneys' advice are elements of that defense; thus, the purported variance in prosecution theories should not have surprised or prejudiced McClatchey.

Moreover, the district court granted the attorney defendants' motions for judgment of acquittal at the close of the government's case, before McClatchey presented his defense and well before he took the stand. McClatchey therefore had ample time to alter his evidentiary and testimonial strategy to diminish any prejudice which might have resulted from the district court's decision. *Cf. Lincoln v. Sunn*, 807 F.2d 805, 813 (9th Cir. 1987). Additionally, McClatchey's failure to either move for a new trial or request a continuance when the district court

granted the attorney defendants' motions "militates against any argument that he was surprised by or not prepared to defend against the [allegedly new prosecution] theory." *United States v. Weiss*, 752 F.2d 777, 790 (2d Cir. 1985).

Relatedly, McClatchey argues the alleged variance was substantially prejudicial because by indicting the attorney defendants, despite the lack of evidence against them, the government tainted the attorney defendants' actions in the minds of the jury, a taint which harmed McClatchey's good faith reliance defense. This argument is also without merit, however, because McClatchey's good faith reliance defense in no way depended on the legality of the attorney defendants' actions. As Instruction 39 indicates, even if the attorney defendants were acting with criminal intent, so long as McClatchey sought their advice *in good faith*, made full disclosure to them, and acted strictly in accordance with their instructions, he would have been entitled to an acquittal.

Finally, McClatchey argues the district court's acquittal of the attorney defendants prejudiced him because the jury likely interpreted this ruling along with the continued prosecution of McClatchey as a signal that the court believed McClatchey was guilty. The jury, however, was not informed that the district court had acquitted the attorney defendants. Instead, the district court merely told the jurors that "the charges against [the attorney defendants] . . . have been removed from your consideration and are no longer before you for decision." The district court further instructed the jury, "Do not concern yourself with these developments and do not speculate about them." As noted earlier, this court presumes that

the jury followed the district court's instructions and therefore did not speculate as to the reason why the charges against the attorney defendants had been removed from its consideration. *See Ailsworth*, 138 F.3d at 850. The acquittal of the attorney defendants, therefore, did not substantially prejudice McClatchey.

In sum, even if the district court's acquittal of the attorney defendants created a variance between the allegations in the indictment and the case presented at trial, this court is unconvinced that such a variance substantially prejudiced McClatchey. The district court thus improperly granted McClatchey's motion for a new trial on this basis.

b. The Other Hospitals Evidence

The indictment alleged that all seven indicted conspirators engaged in one broad conspiracy to allow the LaHues to enter into illegal arrangements with Baptist and six other hospitals. At the close of the government's case, however, the district court ruled that the evidence failed to prove McClatchey, Anderson, or Keel were at all part of a conspiracy involving the six other hospitals. The district court thus limited all evidence relating to these six other hospitals to the charges against the LaHues. In granting McClatchey's motion for a new trial, the district court concluded that its narrowing of the conspiracy charge against McClatchey constituted a variance and that the "spillover from the other hospitals evidence" prejudiced him. The district court stated, however, that "[w]ere this factor standing alone, the court would not grant Mr. McClatchey a new trial."

Again, this court concludes that any variance caused by the narrowing of the conspiracy charge did not substantially prejudice McClatchey. In *United States v. Powell*, this court stated,

> A defendant's substantial rights are affected if the jury determines a defendant's guilt by relying on evidence adduced against coconspirators who were involved in separate conspiracies. Relevant factors include: 1) whether the proliferation of separate conspiracies in the case affected the jury's ability to segregate each defendant's individual actions and participation; 2) whether the variance caused confusion among the jurors as to the limited use of certain evidence; and 3) the strength of the evidence underlying the conviction.

982 F.2d 1422, 1431-32 (10th Cir. 1992) (citation omitted). First, the jury's acquittal of Ronald LaHue on the charge of soliciting and receiving bribes from two of the other hospitals and its acquittal of Keel on all charges based on the statute of limitations strongly indicates that it was perfectly capable of segregating and separately evaluating each defendant's individual actions and participation. Second, the district court repeatedly instructed the jury both during and at the end of the trial not to consider the other hospitals evidence against anyone but the LaHues, thus insuring the jury's understanding of the limited use of that evidence. Third, though this court concedes that the case against McClatchey was relatively close, as discussed above the government did present sufficient evidence apart from the other hospitals evidence to prove McClatchey's guilt beyond a reasonable doubt. *See supra* Section III.A. Finally, this court has held that "there is no

fatal variance where a defendant is convicted upon evidence which tends to show a narrower scheme than that contained in the indictment, provided that the narrower scheme is fully included within the indictment." *Ailsworth*, 138 F.3d at 849 (quotation omitted). The narrowing of the conspiracy charge against McClatchey, therefore, did not constitute a fatal variance warranting a new trial.

2. The Jury Instruction

In Instruction 32, the district court charged the jury as follows:

> In order to sustain its burden of proof against the hospital executives for the crime of violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration offered or paid remuneration with the specific criminal intent "to induce" referrals. To offer or pay remuneration to induce referrals means to offer or pay remuneration with the intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must, *at least in part*, have been the reason the remuneration was offered or paid.
>
> On the other hand, defendants Anderson, Keel, and McClatchey *cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes*. Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law. There must

> be an offer or payment of remuneration to induce, as I have just defined it.

(emphasis added). McClatchey contends this instruction was incorrect and warrants a new trial, because a defendant should not be convicted under the Act when his offer or payment of remuneration was motivated merely *in part* to induce referrals, but rather the motivation to induce referrals must be the defendant's *primary purpose*.[6] "We review the district court's decision to give a particular jury instruction for abuse of discretion and consider the instructions as a whole de novo to determine whether they accurately informed the jury of the governing law." *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1262 (10th Cir. 1999).

Whether the "at least in part" or "one purpose" standard applied in the instant case constitutes a correct interpretation of the Act is an issue of first impression in this Circuit. McClatchey urges this court to reject the test set out in Instruction 32 as too broad, because "[e]very business relationship between a hospital and a physician is based 'at least in part' on the hospital's expectation that the physician will choose to refer patients." This argument, however, ignores the actual instruction given in the instant case, in which the district court specifically informed the jury that "McClatchey cannot be convicted merely because [he] hoped or expected or believed that

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[6] In his brief, McClatchey moves this court to allow him to provide additional briefing on this issue and the next should we reach them. This court is convinced that McClatchey had a fair opportunity to fully brief these arguments and thus denies that motion. *See* Fed. R. App. P. 28(c) ("Unless the court permits, no further briefs [beyond the reply brief] may be filed.").

referrals may ensue from remuneration that was designed wholly for other purposes." According to this instruction, therefore, a hospital or individual may lawfully enter into a business relationship with a doctor and even hope for or expect referrals from that doctor, so long as the hospital is motivated to enter into the relationship for legal reasons entirely distinct from its collateral hope for referrals.[7]

The only three Circuits to have decided this issue have all adopted the "one purpose" test.[8] *See United States*

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[7] This court recognizes that it may be difficult for a jury to distinguish between a motivating factor and a collateral hope or expectation. Making such difficult factual determinations, however, is the very role which our system of justice assigns to the finder of fact. *Cf. United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716-17 (1983) ("The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." (quotation omitted)).

[8] McClatchey incorrectly contends that the First and Eighth Circuits have "tacitly approved" the "primary purpose" test. In *United States v. Bay State Ambulance & Hospital Rental Service, Inc.*, the First Circuit explicitly declined to decide whether the "primary purpose" or "one purpose" test is appropriate, because the defendants had been convicted under the more stringent "primary purpose" standard. *See* 874 F.2d 20, 30 (1st Cir. 1989). In resolving a separate issue, however, the Bay State Ambulance court did rely upon the reasoning employed by the Third Circuit in adopting the "one purpose" test in *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985). *See Bay State Ambulance*, 874 F.2d at 30. The Bay State Ambulance court even stated it was "impressed with the . . . reasoning" of *Greber*. *Id.* In *United States v. Jain*, whether the Act encompasses the "primary purpose" or "one purpose" standard was simply not an issue on appeal to the Eighth Circuit. *See* 93 F.3d 436 (8th Cir. 1996).

v. Davis, 132 F.3d 1092, 1094 (5th Cir. 1998); *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68, 71-72 (3d Cir. 1985). In *Greber*, a doctor who owned a diagnostic laboratory was convicted of violating the Act because he paid "interpretation fees" to other physicians to induce them to refer Medicare patients to use his laboratory's services. *See id.* at 69-70. Defendant *Greber* asserted that these interpretation fees compensated the physicians both for providing initial consultation services and for explaining the test results to the patients. *See id.* at 70. On appeal, *Greber* argued that a jury instruction much like Instruction 32 was erroneous, because the Act requires the government to prove that the only purpose for the interpretation fees was to induce referrals and that compensation for services actually rendered could not constitute a violation of the Act. *See id.* at 71. Carefully examining the language and purpose of the Act, the Third Circuit rejected *Greber*'s proposed interpretation and instead held that "if one purpose of the payment was to induce referrals, the [Act] has been violated." *Id.* at 69 (emphasis added). *See generally id.* at 70-72. Specifically, the *Greber* court noted that when Congress amended the Act in 1977 to deter "the growing problem of fraud and abuse in the system," it added a proscription against the payment of "remuneration," which contemplates the rendering of a service, whereas the predecessor statute merely prohibited payment of "kickbacks," for which no service is rendered. *Id.* at 70-71, 71-72. The *Greber* court thus concluded that the "one purpose" test is consistent with the legislative intent behind the amended Act. *See id.* at 72.

This court agrees with the sound reasoning in *Greber* and thus holds that a person who offers or pays remuneration to another person violates the Act so long as one purpose of the offer or payment is to induce Medicare or Medicaid patient referrals. Because the district court accurately informed the jury of the applicable law, McClatchey is not entitled to a new trial based on the jury instructions.

3. Co-Conspirator Non-Hearsay Evidence

McClatchey also argues he is entitled to a new trial because the district court erroneously admitted evidence under the co-conspirator non-hearsay rule.[9] *See* Fed. R. Evid. 801(d)(2)(E). McClatchey, however, fails to identify the specific statements which he now contends were wrongly admitted or even meet this court's modest requirement that he provide citations to the record where these statements might be found. *See* Tenth Cir. R. 28.2(C)(2), (3)(a). Due to these failures, this court cannot even attempt to assess the merits of his argument. The issue of the admissibility of this evidence is therefore waived on appeal. *See Shaw v. AAA Engineering & Drafting, Inc.*, Nos. 97-6265, -6266, 2000 WL 640249, at *16 n25 (10th Cir. May 18, 2000) (concluding challenge to evidence was waived on appeal because the appellant did not specify the precise evidence which it claimed was wrongly admitted).

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[9] For the same reason stated in note 6, *supra*, this court denies McClatchey's motion to provide further briefing on this issue.

IV. CONCLUSION

This court concludes that the government presented sufficient evidence from which a reasonable jury could infer McClatchey knowingly, voluntarily, and purposefully entered into an agreement with the specific intent to violate the Act. This court also disagrees with the district court's ruling that prejudicial variances between the indictment and the case presented at trial warrant a new trial. Nor do the jury instructions provide the basis for granting McClatchey a new trial. We therefore **REVERSE** the judgment of acquittal and the alternative order for a new trial entered by the District Court for the District of Kansas and **REMAND** to that court with instructions to reinstate the verdict rendered by the jury.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ROBERT C. LAHUE; DAN ANDERSON; RONALD H. LAHUE, Defendants - Appellants.	)	Nos. 99-3344 99-3347 99-3352

ORDER
Filed March 13, 2000

This matter is before the court on appellants' motion to consolidate the *LaHue* and *Anderson* appeals with 99-3274, *United States v. McClatchey*, for oral argument only, and the government's response and objections. The motion is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: /s/ Keith Nelson
Keith Nelson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States Of America,	)	Case Nos. 98-20030-01-JWL
Plaintiff,	)	98-20030-03-JWL
v.	)	98-20030-04-JWL
Dan Anderson (01),	)	98-20030-06-JWL
Robert C. LaHue (03),	)	
Ronald H. LaHue (04),	)	
Dennis McClatchey (06),	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed Jul. 21, 1999)

This matter is presently before the court on motions for acquittal, new trial, arrest of judgment, and dismissal (Docs. 423, 425, 426, 427, 428, 432) filed by the four defendants who were convicted of various Medicare fraud offenses by a jury following a nine week trial. Also before the court is the defendants' motion to compel production of the lengthy and detailed sentencing memo (Doc. 420) which the government provided ex parte to the District of Kansas probation officers involved in preparing the Pre-Sentence Investigation report in this case. The court has devoted countless hours to consideration of the arguments put forth in the parties' papers. It has carefully considered the factual and legal points addressed and has conducted its own thorough legal research. The questions presented are often difficult to resolve and some are exceedingly close calls. While most of the issues have been raised, litigated and decided by the court

previously before and during trial, other matters are ripe for indepth consideration virtually for the first time at this stage of the case. In any event, the court is now prepared to rule.

For the reasons set forth below, the court grants Mr. McClatchey's motion for acquittal and, in the alternative,[1] for a new trial. The court also grants Ronald LaHue's motion for acquittal as to count eight. The remainder of the motions for acquittal, new trial, arrest of judgment, and dismissal, are denied. The defendants' motion for production of the government's sentencing memorandum is granted.

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[1] Mr. McClatchey's motion for new trial is granted conditionally pursuant to Fed.R.Crim.P. 29(d) ("If a motion for judgment of acquittal after verdict of guilty . . . is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed.").

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I. Background

A. Procedural History and Parties

On July 15, 1998, a grand jury returned a twelve-count superseding indictment charging seven defendants with conspiracy pursuant to 18 U.S.C. § 371 (count one). The indictment also charged each defendant with one or more substantive violations of the Medicare Anti-Kickback Act pursuant to 42 U.S.C. § 1320a-7b(b) (counts two through ten). Two defendants were charged with false claims conspiracy pursuant to 18 U.S.C. § 286 (count eleven), and one defendant was charged with witness tampering pursuant to 18 U.S.C. § 1512 (count twelve).

Throughout this case, the court and the parties have placed the defendants into three distinct groups. One group, which the parties and the court have referred to generally as the doctor defendants, consists of two brothers, Drs. Robert and Ronald LaHue. The Drs. LaHue are osteopathic physicians, and were the longtime principals of a now-defunct organization called Blue Valley Medical Group ("BVMG"). BVMG was wholly owned by Robert LaHue, and Ronald LaHue was at all times a key employee. A second group, which the parties and the court have referred to generally as the hospital executive defendants, consists of Dan Anderson, Dennis McClatchey, and Ronald Keel. All of the hospital executive defendants worked for Baptist Medical Center ("Baptist"), a Kansas City, Missouri hospital. Dan Anderson was the President and Chief Executive Officer of Baptist,

Dennis McClatchey was Senior Vice President and Chief Operating Officer, and Ronald Keel was a Vice President whose responsibilities included monitoring the relationship between Baptist and BVMG. A third group, which the parties and the court have referred to generally as the lawyer defendants, consists of attorneys Ruth Lehr and Mark Thompson. Both attorneys represented Baptist at various times during the course of the alleged conspiracy.

In count one, the indictment alleged a conspiracy among all seven defendants to offer, pay, solicit, and receive remuneration in return for Medicare patient referrals at seven different hospitals in the Kansas City, Wichita, and St. Louis areas. The count one conspiracy allegedly involved all of the substantive conduct alleged in counts two through ten. Count two alleged substantive violations of the Medicare Anti-Kickback Act against the doctor defendants in connection with BVMG's relationship with Baptist. Count three alleged substantive violations of the Medicare Anti-Kickback Act against the hospital executive defendants and attorney Ruth Lehr in connection with Baptist's relationship with BVMG. Count four alleged similar conduct against attorney Mark Thompson. Counts five through ten alleged substantive violations of the Medicare Anti-Kickback Act against the Drs. LaHue in connection with St. Joseph Medical Center in Wichita, Deaconess Hospital in St. Louis, Bethany Medical Center in Kansas City, Kansas, Alexian Brothers Hospital in St. Louis, Liberty Hospital in Liberty, Missouri, and Olathe Medical Center in Olathe, Kansas,

respectively. Count eleven alleged a false claims conspiracy against the Drs. LaHue in connection with their practices at BVMG. Count twelve alleged witness tampering against Robert LaHue.

Over the course of the nine week jury trial, portions of the indictment were pared away. Specifically, the court severed counts eleven and twelve, holding the counts improperly joined pursuant to Fed.R.Crim.P. 8(b). The court granted the doctor defendants' motion for acquittal as to count 10, involving Olathe Medical Center, on statute of limitations grounds. The court granted the lawyer defendants' motion for acquittal on all counts, holding the evidence to be such that no reasonable jury could conclude that the lawyer defendants had the criminal intent necessary to commit the crimes alleged. The court also held that as to the count one conspiracy charge, the evidence was such that no reasonable jury could conclude that the hospital executives and lawyers had any involvement with a conspiracy at hospitals other than Baptist. In the end, the case was submitted to the jury only on the Baptist conspiracy charged in count one, the substantive violations involving Baptist alleged in count two against the doctors and count three against the hospital executives, and the substantive violations against the doctors alleged in counts five through nine.

The jury convicted four of the five remaining defendants, finding specifically that the four were involved in a conspiracy at Baptist and that they committed the substantive anti-kickback violations with respect to Baptist alleged in counts two (Robert and Ronald LaHue) and three (Dan Anderson and Dennis McClatchey). The jury acquitted the fifth defendant, Ronald Keel, on all charges

based on his statute of limitations defense. The jury convicted both LaHues on counts seven through nine, involving Bethany Medical Center, Alexian Brothers Hospital, and Liberty Hospital. The jury convicted Robert LaHue and acquitted Ronald LaHue on counts five and six, involving St. Joseph Medical Center and Deaconess Hospital. Put another way, Dan Anderson and Dennis McClatchey, then, were convicted of counts one and three. Robert LaHue was convicted of counts one, two, and five through nine. Ronald LaHue was convicted of counts one, two, and seven through nine.

B. BVMG's Relationship with Baptist[2]

In the early 1980s, Drs. Robert and Ronald LaHue were associated with University Hospital, the teaching hospital formerly affiliated with the osteopathic school in Kansas City, Missouri. The LaHues had attended the school, and over time began sending patients to and treating patients in University Hospital. Both doctors were part-time faculty members.

The LaHues did not deliver their health care services in a traditional manner. Instead of operating out of a clinic, for example, the LaHues built their practice by treating patients in nursing homes. BVMG was the trade name under which the doctors practiced. By 1984, BVMG had a "census," or patient population, of approximately

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[2] In accordance with the applicable standards under Fed.R.Crim.P. 29 and 33, these facts are related in a light most favorable to the government.

2,500 nursing home patients in the Kansas City metropolitan area. The uncontroverted evidence at trial was that BVMG's large patient base was in substanital part due to the LaHues' willingness to go to nursing homes to treat patients – serving a market that other doctors considered undesirable. Typically, the only care available to most nursing home patients from physicians involved costly ambulance rides to a hospital emergency room for acute care. Chronic ailments were often not addressed.

In approximately the Fall of 1984, the LaHues sought a teaching salary increase from University Hospital. The LaHues told University that if the hospital wasn't interested in increasing the salary, "they [the LaHues] would be no longer putting patients in our institution. They'd be moving them to Baptist." Tr. at 39. Ronald LaHue told University Hospital that the LaHues didn't want to be disloyal to the school, but "business is business." Tr. at 41. Robert LaHue told University Hospital that Baptist had offered to pay the LaHues $120,000 to $140,000 to move their patients. University Hospital refused to pay.

The LaHues' conversations with University Hospital occurred contemporaneously with discussions among Ronald Keel and others at Baptist about the possibility of entering an arrangement with the LaHues that was similar to the arrangement at University Hospital. Mr. Keel, who was a neighbor of Ronald LaHue, presented the idea initially to Mr. Anderson and later to the rest of the administrative staff, including Dennis McClatchey, to pay the doctors to affiliate with Baptist. Baptist considered various alternatives, including an outright purchase of BVMG. In the context of a preliminary proposal to purchase the medical laboratory operated by BVMG, Clem

Fairchild, a well respected corporate attorney who was inexperienced in the complexities of healthcare law, drafted a proposed agreement that specifically linked the purchase of the laboratory with patient referrals. Mr. Fairchild forwarded the proposal to Baptist CFO Gerald Probst,[3] and copied Mr. Anderson. Ruth Lehr vetoed the idea as a blatant violation of Medicare Fraud and Abuse law.

Rejecting the idea of a purchase for the time being, Baptist ultimately decided to enter an arrangement making the LaHues "Co-Directors of Gerontology" and paying them $75,000 per year each. When the LaHues began receiving their $75,000 annual payments from Baptist, BVMG referrals to University Hospital dropped dramatically and BVMG began referring large numbers of patients to Baptist. Although the formal contractual relationship between Baptist and the LaHues changed periodically over the next ten years in terms of the services the LaHues were scheduled to perform, the $75,000 annual payments continued unabated until approximately July 1994. Mr. Anderson directed the $75,000 payments, but although there is overwhelming evidence indicating Mr. McClatchey knew about the payments, there is no evidence he acted affirmatively to bring them about.

It is important to point out, too, that there was no evidence at trial that the referred patients received substandard care at Baptist. To the contrary, Baptist came to

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[3] Mr. Probst testified for the government at trial under a grant of immunity.

be widely recognized as a premier provider of gerontology services. There was also no evidence at trial that the referral relationship affected patient choice. To the contrary, where patients or their families expressed a hospital preference, BVMG worked to honor the request. There was, moreover, no evidence at trial that any patient received unnecessary services. To the contrary, witness after witness testified that the BVMG/Baptist patient referral system had appropriate checks and balances to guard against such abuses.

In the mid 1980s, about the time Baptist's relationship with BVMG began, the Medicare system changed the way it reimbursed hospitals for inpatient services. Previously, Medicare reimbursed hospitals for the actual cost of providing medical services. In an effort to curtail rising costs, however, Medicare implemented a system of payment based on Diagnostic Related Groups, or DRGs. Under the DRG system, Medicare reimbursed hospitals for particular diagnoses, irrespective of how much the hospital spent to care for the patient. The DRG system, plus competition in the Kansas City health care market, created a need for Baptist to fill its inpatient beds. Defendant Anderson was concerned about filling the beds by keeping admissions up. Admissions from BVMG helped Baptist fill its market-based need.

On January 9, 1985, Mr. McClatchey reported to the hospital's department directors that BVMG had named Baptist as its "hospital of choice." He reported that BVMG represented approximately 3,500 nursing home beds, and explained the hospital's plans for how to deal with the influx of elderly patients. At a hospital Board of Trustees meeting on March 21, 1985, Mr. Anderson, after

reporting on the hospital's decision not to purchase any part of BVMG, reported the LaHue management services arrangement and reported to the hospital Board of Trustees that "[d]uring the first two and one-half months of operation the Blue Valley Medical Group has admitted 145 patients to the hospital, and outpatient business is steadily growing."

At some point in the summer of 1985, the LaHues approached Mr. Anderson seeking help in managing their practice. The LaHues suggested that Baptist employee Tom Eckard, essentially a marketing specialist with whom the LaHues were familiar, be assigned to help them organize their practice. Mr. Anderson agreed, and Mr. Eckard became "Director of Geriatric Services." Mr. Eckard described his job as "liaison function between Baptist Medical Center and Blue Valley Medical Group."[4] Tr. at 4346. Based on his discussions with Mr. Anderson, Mr. McClatchey, and Mr. Keel, Mr. Eckard understood his primary job duty was to "maintain the relationship with Blue Valley Medical Group on behalf of Baptist Medical Center in order to assure that the flow of patients to the hospital would continue." Tr. at 4346. Mr. Eckard, of course, also assisted BVMG with organizational matters, which was not a strength of the LaHues. Ms. Lehr originally drafted an agreement whereby BVMG would pay Baptist for Mr. Eckard's services, but the LaHues balked, and no payments were made. In effect, although Baptist derived considerable benefit from Mr. Eckard's placement with BVMG because Mr. Eckard helped streamline the

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[4] Mr. Eckard testified for the government pursuant to a plea agreement.

patient flow, Baptist was loaning BVMG an employee for free. The Eckard arrangement continued from mid-1985 until 1993.

There were problems with the Gerontology Directorship arrangement,[5] so Mr. Keel asked Ms. Lehr to evaluate the possibility of entering a consulting arrangement with the LaHues. Ms. Lehr advised against such an arrangement because it involved potential Medicare Fraud and Abuse concerns. She advised Mr. Keel, with copies to Mr. Anderson and Mr. McClatchey, that a consulting arrangement was acceptable only if "the Drs. LaHue . . . perform valid services for [Baptist], regardless of the label used to describe those services, and the compensation must be reasonable." Mr. Keel and Ms. Lehr explored "other types of compensation arrangements," including an option to purchase and a structured buy-out.

Baptist decided to pursue entering into a consulting relationship with the LaHues. On January 7, 1986, Mr. Keel recommended modifying the Gerontology Directorship agreement to reflect accurately the services the LaHues were providing to Baptist.[6] He also recommended reducing the annual payments to the LaHues

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[5] There was concern that the arrangement violated the hospital's by-laws because the LaHues were not eligible for hospital staff membership.

[6] Mr. Eckard described the services the LaHues were performing pursuant to the agreement as "minimal to none." Tr. at 4404. He further testified that Baptist did not attempt to collect reimbursement for the services required but not performed. Tr. at 4407-08.

from $75,000 each to $50,000 each, apparently because the Adult Health Care system at Baptist was now up and running and the hospital no longer needed the same level of service from the LaHues. Mr. Anderson okayed the recommendation for accurately specifying the LaHues' services, but wanted to "discuss" Mr. Keel's recommendation to reduce the fees. The fees were never reduced. Mr. McClatchey was copied on Mr. Keel's written recommendations, but there is no evidence he took part in or knew about the subsequent fee discussion or why the fees were not reduced.

Mr. Keel consulted with Mr. Eckard to identify services the LaHues could perform pursuant to the consulting contract. Ms. Lehr drafted the resulting agreement. Mr. McClatchey was copied on letters explaining the modifications to the contract, and he was "aware and involved in contract development." Govt. Ex. 68. Mr. Anderson and both Drs. LaHue signed the revised contract, which called for the LaHues to perform specified consulting services both within the hospital and outside the hospital, in nursing homes.

The Drs. LaHue actually performed only minimal services under the contract. In March of 1987, Deb Grimes, a Baptist employee involved with the gerontology program, informed Mr. McClatchey that the LaHues were not performing the functions set forth in the consulting agreement, except for attending the quarterly Adult Health Care staff meetings. Ms. Grimes met with Mr. McClatchey, who said he would "take care of it." Tr. at 7831. Mr. McClatchey directed hospital staff to "round" with the LaHues as specified in the contract, and those

rounds immediately began. The evidence was undisputed, in any event, that Mr. McClatchey did not have day-to-day responsibility to monitor contract compliance. Mr. Eckard testified that Mr. McClatchey, when notified about contract compliance problems, made efforts to ensure compliance, but that the compliance within the hospital eventually tapered off because of resistance among hospital staff. The hospital front-line staff apparently had little interest in interacting with the LaHues.[7]

Also in 1987, some executives at Baptist began to realize that Mr. Eckard's allegiances were not entirely with Baptist and that the arrangement might have private inurement ramifications under federal tax law. In light of these concerns, Mr. McClatchey and Mr. Probst recommended to Mr. Anderson that Mr. Eckard be terminated. Mr. Anderson declined. Mr. Anderson "had an understanding that the physicians weren't in a position to employ Mr. Eckard, 'cause of financial reasons or concerns', and had a concern relative to that recommendation and proceeding with it in that it would disrupt or create a problem with the relationship between the Medical Center and [BVMG] or, specifically, the physicians." Tr. at 1208 (Probst).

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[7] Mr. Eckard testified, "In questions to Mr. Keel and Mr. McClatchey, primarily where I kept asking why there wasn't more pressure put on the departments . . . to allow lectures or consulting to occur or why rounds weren't continuing to be done in the nursing homes [by hospital nurses], I was given the impression that – that it had been tried but there wasn't a lot of interest there, and that the pressure was going to be taken off or had been taken off and basically met with resistance and decided not to continue to push for it." Tr. at 5570.

By early 1991, Baptist was involved in merger discussions with other hospitals in the Kansas City area. These discussions eventually resulted in a merger whereby Baptist became a subsidiary of a corporation called Health Midwest. In connection with the merger, attorney Mark Thompson reviewed Baptist's physician contracts, and identified the BVMG relationship as a problem area. After speaking about the relationship with Ms. Lehr, Mr. Thompson reported in a January 30, 1991 due diligence memo that "the history of the negotiation over this contract causes [Ms. Lehr] to wonder if the services called for are in fact being rendered. . . . [I]t may be a good idea to discuss with Baptist management whether the services called for in the contract are in fact being rendered and whether this is backed up by evidence in Baptist's files." Govt. Ex. 129. He also reported Ms. Lehr's feeling that "if these services are in fact being rendered as provided in the contract, then the $75,000 fee paid to each of them is fair compensation." *Id.*

In the summer of 1991, Mr. Keel proposed a change in the 1986 contract. The hospital had learned that Mr. Eckard was involved in helping the LaHues market their "system" to other hospitals in Kansas City and to hospitals in Wichita and St. Louis. In response, Mr. Keel suggested that Mr. Eckard no longer be employed by Baptist, that the contract be modified to explicitly direct patients to hospitals within specified postal zip codes, and that the hospital increase the amount of fees paid to the LaHues by $70,000, which was the approximate amount of Mr. Eckard's salary at the time. Mr. Keel directed his suggestions to Mr. McClatchey, who forwarded them to

the hospital's lawyers. The hospital did not adopt the recommendations.

In August of 1991, Mr. Thompson informed Mr. Keel, with copies to Mr. McClatchey and Mr. Anderson, that the 1986 agreement did not meet the Anti- Kickback Act safe harbor regulations. Mr. Thompson recommended making good faith efforts to bring the contract into compliance with the safe harbor regulations, which would have required a clause specifying intervals of service and the rate to be charged per interval and more extensive documentation that the services specified were actually being performed. Mr. Thompson also indicated, however, that the services which were specified in the existing contract to be rendered by the LaHues "appear to be substantial."

The parties set out to draft a new contract, and negotiations went back and forth. Mr. Keel left Baptist in late 1991,[8] and responsibility for contract negotiation fell into the lap of Baptist Vice President Kevin McGrath, who reported directly to Mr. McClatchey.[9] Robert LaHue told Mr. McGrath that the doctors "were having difficulties in performing some of the services that were delineated in the contract." Tr. at 2753. Mr. McGrath shared that information with Mr. Anderson and Mr. McClatchey. Mr. McClatchey was surprised to learn the information, and

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[8] Mr. Keel was ultimately acquitted because the jury found he withdrew from the alleged conspiracy when he left Baptist in late 1991, prior to the critical date for statute of limitations purposes.

[9] Mr. McGrath testified for the government under a grant of immunity.

directed Mr. McGrath to check out the problem and report back.

The parties, including Mr. McClatchey, Mr. McGrath, Mr. Thompson, the Drs. LaHue, and Mr. Eckard, went through numerous contract drafts and revisions, all drafted and reviewed by Mr. Thompson. In one draft agreement, Mr. McClatchey highlighted an area he believed ought not to be part of the agreement because he was concerned the services would not occur. On November 4, 1992, Mr. Eckard forwarded Mr. McGrath a list of job duties from Robert LaHue. Mr. McGrath forwarded the list to Mr. McClatchey, calling it "not very complete."

On November 5, 1992, the FBI appeared at Baptist to interview Mr. McClatchey and Mr. Anderson concerning the hospital's relationship with BVMG, specifically seeking information about the consulting fees and the Eckard arrangement. Immediately following the FBI visit, Baptist employed attorneys from Baltimore specializing in civil and criminal health care fraud cases. *See United States v. Anderson*, ___ F.Supp.2d ___, No. 99-MC-205, -207, 1999 WL 412313 (D.Kan. May 7, 1999) (government violated the Baltimore attorneys' due process rights by publicly labeling them as unindicted coconspirators in pretrial documents). In a November 11, 1992 meeting, the Baltimore attorneys recommended documenting actual performance of consulting duties. Such a move, according to Baltimore counsel, would move the contract issue "out of the criminal arena and into the civil side." Govt. Ex. 182A. The parties at the meeting agreed to change the consulting relationship to a new part-time employment contract which more accurately described the services

that were actually being performed. The Baltimore attorneys were even more pointed with respect to the Eckard arrangement. The group decided that, "as quickly as possible, we need to get [Mr. Eckard] off the Baptist payroll and onto the payroll at Blue Valley Medical Group." *Id.*

Health Midwest attorney Gina Kaiser testified that it was Mr. McClatchey's responsibility to fix the Eckard arrangement. The LaHues initially were unresponsive to the hospital's demands, but agreed to come to the table to discuss modifying the arrangement after the hospital gave them an ultimatum date. When BVMG finally came to the table, there were a series of meetings among Robert LaHue, Mr. McClatchey, and Mr. Thompson. It became clear that BVMG had no intention of putting Mr. Eckard on its payroll, so Mr. McClatchey decided to bring Mr. Eckard back to Baptist effective March 1, 1993.

At least initially, Mr. McClatchey seemed reluctant to cut all ties between Mr. Eckard and BVMG. In early February 1993, as the parties were hammering out the specifics of Mr. Eckard's return, he asked Mr. Thompson whether it would be appropriate to send Mr. Eckard on site at BVMG from time to time. Also in this prereturn-to-Baptist time frame, Mr. McClatchey asked Mr. Eckard to "list what my being pulled out of Blue Valley Medical Group would mean in terms of lost service or things that the practice – Dr. Bob LaHue was getting from me that he would no longer be getting." Tr. at 4517. Mr. Eckard testified that Mr. McClatchey was "concerned about the negative impact my removal from the Blue Valley practice would have on the relationship with Blue Valley Medical Group." Tr. at 4518.

On an early February draft of Mr. Eckard's new written job description, Mr. Eckard reassured Mr. McClatchey that "Bob LaHue sees [the proposed new relationship] as 'no real change.' " Govt. Ex. 204. The job requirements included Mr. Eckard marketing Baptist services to nursing homes who, he reported, saw him as "BVMG's Administrator." *Id.* Mr. Eckard testified that the proposed job description differed from what he was doing previously in that "[i]t was more Baptist oriented and less specifically Blue Valley Medical Group oriented." Tr. at 4519. Nonetheless, it did involve some duties related to BVMG. At least according to Mr. Eckard, his purpose after the change remained "[t]o maintain the relationship between the Blue Valley Medical Group and the hospital in order to assure the continued flow of patients." Mr. Eckard did not, however, go so far as to say that Mr. McClatchey or anyone else so instructed him or was aware that he saw his job in that light.

In this vein, it is important to note that there was overwhelming evidence at trial indicating that Mr. Eckard, unbeknownst to the hospital administrators, engaged in self-dealing efforts which had the effect of promoting BVMG's interests over Baptist's. He surreptitiously negotiated with Robert LaHue to obtain 10 percent commissions on all new consulting fee business (i.e. with non-Baptist hospitals), and also negotiated a car allowance with BVMG despite Mr. Keel's explicit instruction that he not do so. Even after Mr. Eckard returned to Baptist, there was evidence that he took steps to conceal his BVMG-related activities from the Baptist administrators. He continued corresponding with other hospitals on behalf of BVMG without informing anyone at Baptist.

The February 12, 1993 final draft of Mr. Eckard's new job description differed from the early February proposal in that it omitted any reference to any work with BVMG, and instead involved marketing efforts with "area Long Term Care Physicians." Govt. Ex. 205. The duties under that portion of the job description, however, were markedly similar to the duties in the previous draft that explicitly related to BVMG. Mr. Thompson reported to Baltimore counsel that he and Mr. McClatchey planned to emphasize to Robert LaHue in a February 15 meeting "that the new job description replaces the old one and that nothing in the new description implies any services to the LaHues in their practice." *Id.*

True to Mr. Thompson's word, Mr. McClatchey suggested a laudable alternative solution at the February 15 meeting. Despite his earlier inquiries of Mr. Thompson and Mr. Eckard concerning how to let Mr. Eckard continue to be a free benefit to BVMG, Mr. McClatchey proposed a new alternative – having BVMG pay Baptist for Mr. Eckard's services. Dr. LaHue apparently declined. Also during these meetings, Dr. LaHue asked Baptist to purchase BVMG, increase BVMG's annual take, or base the fees paid on a per patient basis. Baptist refused. Mr. Eckard returned to full-time hospital duties as of March 1, 1993.

Mr. Anderson and the LaHues finally executed a new agreement, titled a "Medical Group Services Agreement," on April 1, 1993. The agreement contained at least some of the services that had been identified as areas of nonperformance in the past.

Mr. Eckard left Baptist in September 1993 to pursue his own start-up business which he intended to compete with BVMG. Mr. McClatchey left Baptist in October 1993 to begin an unrelated employment position with Health Midwest.

On November 26, 1993, Robert LaHue wrote a letter of termination to Mr. Anderson. Pursuant to the terms of the agreement and the letter, the agreement was to terminate as of February 28, 1994 because of a proposed sale of BVMG to Vencor, an entity unrelated either to Baptist or BVMG. After receiving the letter, Mr. Anderson worked to develop a strategy to replace the BVMG patients, but did nothing to replace the LaHues' consulting services. Baptist began quiet efforts to compete with BVMG for control of nursing home beds.

The Vencor sale fell through. The parties entered another agreement dated March 1, 1994 that listed the same, but fewer, contractual duties for the LaHues to perform. This agreement was to last only for three months. Later in March, Ronald LaHue met with Mr. McGrath to discuss Baptist's efforts to compete with BVMG for nursing home patients, which the LaHues apparently had begun to perceive. Dr. LaHue told Mr. McGrath that BVMG "feels they have value in the 2,000 nursing home beds they control. They wish to work out any arrangement with Health Midwest that pays them for this value." Govt. Ex. 232. Later, on March 18, 1994, Dr. LaHue proposed a "sale" of approximately 2,300 nursing home beds in the Kansas City area for $2,500,000 and future employment. Baptist refused. Discussions to save the relationship continued until January 1995, when the relationship finally ended.

C. Laboratory and Other Relationships Between Baptist and BVMG

Effective June 1, 1986, BVMG and Baptist formalized a laboratory services agreement. Under the agreement, BVMG collected specimens, and Baptist performed necessary lab testing. BVMG billed Medicare, and split the net revenues with Baptist on a fifty-fifty basis. The agreement was renewed in 1988, but the allocation was split to allow BVMG to collect nearly two-thirds of the revenues. Under the agreement, it was BVMG's responsibility to collect all receivables. Mr. McClatchey signed the 1988 renewal agreement.

In 1986, BVMG fell behind in collecting the receivables. Tom Eckard proposed an idea to Baptist whereby Baptist would hire a temporary employee to bring the lab up to date in its billing practices. Mr. Eckard sold his idea to Mr. Keel (who apparently obtained Mr. McClatchey's approval) by arguing that BVMG had little interest in collecting the receivables in a timely manner and the hospital needed to shore up its accounting for those receivables. The project resulted in a nice net income for the hospital.

In the early 1990s in response to new regulations from Congress relating to lab referrals, BVMG needed to restructure its lab arrangement. Mr. Keel recommended, and Mr. Anderson approved, the loan of an employee to BVMG to bring the lab "up to speed." Mr. McClatchey knew about the arrangement but there is no evidence he acted to bring it about.

In 1990, the LaHues approached Mr. Keel about Baptist helping them solicit nursing home referrals from Baptist patients who were in need of nursing home care but otherwise unassigned to any specific nursing home. Mr. Keel implemented this idea with other hospital staff after informing Mr. McClatchey and Mr. Anderson of the plan.

In early 1991, the LaHues asked Baptist for a loan to cover payroll. Mr. McClatchey asked Mr. McGrath to work with Mr. Thompson on documenting a $100,000 line of credit. Mr. Thompson drew up the documents, but the LaHues never drew on the line of credit. There is no evidence that Mr. McClatchey did not intend any loan which might have been made to be repaid.

In 1992, the LaHues asked Baptist to take over the lease of certain office space. Baptist agreed, and began making lease payments as of September, 1992. Mr. McClatchey knew about this arrangement, but it was negotiated by Mr. McGrath and documented by Mr. Thompson. It constituted a beneficial business arrangement from Baptist's perspective, allowing Baptist to aquire needed space at a favorable rate.

D. BVMG's Relationship with Other Hospitals

1. St. Joseph Medical Center

Beginning in the summer of 1988, and continuing through November of 1989, Robert LaHue and Tom Eckard, acting for and on behalf of BVMG,[10] negotiated

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[10] As referenced above, Mr. Eckard had arranged with BVMG to collect a 10% commission on any new consulting fee business. Baptist personnel were unaware of this arrangement.

an agreement with St. Joseph Medical Center whereby BVMG would refer Medicare eligible patients to St. Joseph Hospital for an ostensible consulting fee. The solicitation was Robert LaHue's idea. The 1988 proposal discussed at the hospital explicitly states that BVMG will refer all its Wichita patients to St. Joseph Hospital. The consulting services outlined in the final version of the contract were similar to the consulting services listed in the Baptist consulting contracts. BVMG did only minimal consulting, and any consulting that was done was done by Tom Eckard – not BVMG. The only benefit to the hospital from the arrangement was the referrals because the services listed were for the benefit of BVMG's nursing home patients, not the hospital. St. Joseph Medical Center paid BVMG $50,000 per year at first, and the amount increased to $100,000 per year in 1992 when BVMG's Wichita patient census had grown substantially.

2. Deaconess Hospital

Beginning in May 1989 and continuing through February 1990, Robert LaHue and Tom Eckard, acting on behalf of BVMG, negotiated an arrangement with Deaconess Hospital whereby BVMG would refer Medicare eligible patients to Deaconess Hospital in return for an ostensible consulting fee. This agreement, like the agreement at St. Joseph Medical Center, provided that Deaconess Hospital would pay $50,000 per year to BVMG. Witnesses testified that despite the consulting services required of BVMG in the agreement, Deaconess Hospital did not need any expertise from BVMG to take care of elderly patients at Deaconess Hospital. BVMG sent Deaconess Hospital patients – nothing more.

3. Bethany Medical Center

Beginning in April 1991 and continuing through May 1991, Tom Eckard and Dr. Chris Murray, acting on behalf of BVMG, on the recommendation of Ronald LaHue, negotiated an agreement with Bethany Medical Center whereby BVMG would refer Medicare eligible patients to Bethany Medical Center in return for an ostensible consulting fee. The solicitation at Bethany Medical Center occurred with the approval of Robert LaHue. When the three BVMG doctors primarily responsible for nursing homes in Bethany Medical Center's area jumped from BVMG to Tom Eckard's new startup business in 1994, Ronald LaHue attempted to reassure Bethany that BVMG would nonetheless send patients. From May 1992 through September 1994, Bethany Medical Center paid BVMG over $169,000.

4. Alexian Brothers Hospital

Beginning in January 1992 and continuing through October 1, 1992, Robert LaHue and Tom Eckard negotiated an agreement with Alexian Brothers Hospital whereby BVMG would refer Medicare eligible patients in return for an ostensible consulting fee. The arrangement here was similar in substance to the arrangements at the other non-Baptist hospitals. Alexian Brothers Hospital paid approximately $190,000 to BVMG during the relationship.

5. Liberty Hospital

At a meeting with Liberty Hospital executives at which Tom Eckard and Robert and Ronald LaHue were all present, BVMG proposed a contract whereby BVMG would be paid for services Liberty was already performing on its own. According to at least one witness at the meeting, "Blue Valley Medical Group approached [Liberty CEO] Joe Crossett about a possible fee in exchange for the patient referrals that they sent." Tr. at 2189. Liberty refused the offer.

II. Motions for Acquittal

Each defendant seeks acquittal pursuant to Fed. R. Crim. P. 29. Specifically, each defendant asserts that the government's proof was insufficient, as to him, to establish the mens rea element of the charged crimes. Each defendant also asserts that the government's proof fell short of proving the unlawful inducement element of an Anti-Kickback Act violation. The court denies the motions of Mr. Anderson and Robert LaHue because the evidence is sufficient for a reasonable jury to have convicted them beyond a reasonable doubt. The court grants the motion of Mr. McClatchey, because, although the evidence appears close upon first glance, it is upon closer review insufficient to support a jury finding beyond a reasonable doubt on the element of intent. The court grants the motion of Ronald Lahue as to count eight but denies the motion with respect to all other counts.

A. Standard

A motion for judgment of acquittal challenges the sufficiency of the evidence. *United States v. Urena*, 27 F.3d 1487, 1490 (10th Cir.1994). In deference to the jury's finding of guilt, the court must view the evidence in a light most favorable to the government. *United States v. Valadez-Gallegos*, 162 F.3d 1256, 1262 (10th Cir. 1998). The court must then determine whether there is substantial evidence to support a verdict of guilt beyond a reasonable doubt. *Id.* To support a conviction the evidence must do more than simply raise a suspicion of guilt; the evidence must be substantial. *United States v. Taylor*, 113 F.3d 1136, 1144 (10th Cir. 1997). The jury, as fact finder, is entitled to consider both direct and circumstantial evidence, as well as all reasonable inferences therefrom. *United States v. Hooks*, 780 F.2d 1526, 1531 (10th Cir. 1986). "Even though rational jurors may believe in the likelihood of the defendants' guilt, . . . they may not convict on that belief alone." *United States v. Jones*, 49 F.3d 628, 632 (10th Cir. 1995).

As it relates to Drs. Robert and Ronald LaHue, the Anti-Kickback Act provides in pertinent part:

> Whoever knowingly and willfully solicits or receives any remuneration . . . in return for referring an individual to a person for the furnishing . . . of any . . . service for which payment may be made . . . under [Medicare] shall be guilty of a felony. . . .

42 U.S.C. § 1320a-7b(b)(1). As it relates to Dan Anderson and Dennis McClatchey, the Anti-Kickback Act provides in pertinent part:

> Whoever knowingly and willfully offers or pays any remuneration . . . to any person to induce such person – to refer an individual . . . for the furnishing . . . of any . . . service for which payment may be made . . . under [Medicare] shall be guilty of a felony. . . .

42 U.S.C. § 1320a-7b(b)(2).

The "willfully" language in the Anti-Kickback Act incorporates a heightened mens rea element. Pursuant to the court's instructions,

> An act is done willfully if it is done voluntarily and purposely and with the specific intent to do something the law forbids, that is, with the bad purpose either to disobey or disregard the law. A person acts willfully if he or she acts unjustifiably and wrongly while knowing that his or her actions are unjustifiable and wrong. Thus, in order to act willfully as I have defined that term, a person must specifically intend to do something the law forbids, purposely intending to violate the law.

Instruction No. 36; *see also United States v. Jain*, 93 F.3d 436, 440-41 (8th Cir. 1996). The conspiracy charges require an identical degree of criminal intent. *See United States v. Jones*, 808 F.2d 754, 755 (10th Cir. 1987).

B. Robert and Ronald LaHue

There is ample evidence to support the inference that both Robert LaHue and Ronald LaHue acted with a bad purpose, specifically intending to violate the Anti-Kickback Act at Baptist Hospital. From the beginning of

BVMG's relationship at Baptist – the very first conversation over the neighborhood fence between Ron Keel and Ronald LaHue – the relationship between BVMG and Baptist was about patients and what Baptist would have to do for the LaHues in order to obtain referrals. Immediately when Baptist began paying the LaHues $150,000 per year, BVMG's patient referrals to University Hospital came to a virtual halt and Robert and Ronald LaHue each began referring massive numbers of patients to Baptist. This happened immediately after Ronald LaHue told University Hospital representatives that "business is business" and Robert LaHue told University Hospital that Baptist had offered them a large sum to move their patients.

Witness after witness testified that the LaHues performed very few actual services in return for the substantial annual sum they were paid. Mr. Eckard described the services performed by the LaHues as "minimal to none." Although the LaHues did provide some services under the contracts, many of the services specified in the contracts were services related to care of their own patients.

In connection with the February 1993 meetings to fix the Eckard employment arrangement, Robert LaHue out and out asked Baptist to base the LaHues' fees on a per patient basis. In connection with the 1994 meetings after the failed Vencor sale, Ronald LaHue told Kevin McGrath that BVMG "feels they have value in the 2,000 nursing home beds they control. They wish to work out *any arrangement* with Health Midwest that pays them for this value." (emphasis added).

A reasonable jury could conclude from this evidence that the LaHues solicited and received considerable sums of money from Baptist, intending to be influenced by that money in their patient referral decisions. *See* Instruction No. 33. In light of the ample evidence that the LaHues knew that such patient referral schemes are illegal, there was easily enough evidence for a rational jury to convict them of conspiracy and substantive violations of the Anti-Kickback Act at Baptist beyond a reasonable doubt.

Similarly, there was ample evidence to convict Robert LaHue of substantive violations of the Anti-Kickback Act at St. Joseph Medical Center. The solicitation at St. Joseph was Robert LaHue's idea. BVMG did only minimal consulting under the arrangement, and any consulting that was done was done by Mr. Eckard. BVMG referred its patients to St. Joseph, and was paid a substantial sum.

There was ample evidence to convict Robert LaHue of substantive violations of the Anti-Kickback Act at Deaconess Hospital. Robert LaHue negotiated the familiar consulting-fee-type arrangement with Deaconess, who, witnesses testified, did not need any consulting expertise in the geriatric field. In return for $50,000 per year, BVMG sent Deaconess patients and nothing more.

There was ample evidence to convict Robert and Ronald LaHue of substantive violations of the Anti-Kickback Act at Bethany Medical Center and Liberty Hospital. Ronald LaHue suggested BVMG solicit Bethany, and Robert LaHue approved the suggestion. Bethany paid BVMG, Robert's corporation, over $169,000. BVMG sent Bethany patients. When there was a threat to the patient numbers, Ronald attempted to reassure Bethany that

BVMG would nonetheless continue to send patients. Robert and Ronald together solicited Liberty Hospital "about a possible fee in exchange for the patient referrals that they sent."

There was ample evidence to convict Robert LaHue of substantive violations of the Anti-Kickback Act at Alexian Brothers Hospital. Robert LaHue negotiated the familiar consulting agreement, whereby Alexian Brothers paid BVMG approximately $190,000. BVMG did little or no consulting at Alexian Brothers. Moreover, the overwhelming evidence of Robert LaHue's intent to be influenced in his patient referral decisions at the other hospitals is sufficient to support an inference that he had similar intentions with respect to Alexian Brothers. *See* Fed.R.Evid. 404(b).

Despite the court's ruling at trial to the contrary, however, the evidence was insufficient to support a conviction of Ronald LaHue for principal or aider and abettor liability at Alexian Brothers Hospital. In order to support conviction under an aider and abettor theory, the government needed to prove that Ronald LaHue "knowingly did some act for the purpose of furthering the commission of that particular crime." Instruction No. 35. The only evidence specifically connecting Ronald LaHue with the arrangement at Alexian Brothers Hospital is the equivocal testimony of Mr. Eckard, Ronald's presence at Alexian Brothers Hospital on one occasion, and the appearance of Ronald's name as a copied recipient on three Alexian Brothers-related documents. Mr. Eckard testified that he discussed the idea to solicit Alexian Brothers with Ronald LaHue and that he "believe[d]" that Ronald approved of the solicitation. Tr. at 4654. This

testimony does nothing to show that Ronald did some affirmative act to further the crime because Mr. Eckard's mere belief that Ronald approved is insufficient to show beyond a reasonable doubt that Ronald affirmatively approved. Mr. Eckard also testified, in the context of broad government questions related to the solicitation of all the non-Baptist hospitals as a group, that both Drs. LaHue were "involved in" these relationships. Tr. at 4351. This evidence is too equivocal to support more than a suspicion of guilt because the question and response were too broad; Ronald LaHue was clearly involved in the relationships at Bethany and Liberty and Robert was clearly involved in the relationships with all the non-Baptist hospitals. Ronald's presence at Alexian on one occasion does nothing to support conviction because there is nothing unusual about a doctor appearing in a hospital, and there is no evidence explaining why he was there. *See United States v. Jones*, 44 F.3d 860, 869 (10th Cir. 1995) ("The government must prove, through direct or circumstantial evidence, more than mere presence at the scene of the crime even if coupled with knowledge that the crime is being committed."). The three Alexian Brothers-related documents which mention Ronald LaHue, Govt Exs. 802, 815, and 819, merely list Ronald as a document recipient and do nothing to show that he acted affirmatively to further the Alexian Brothers/ BVMG relationship. Accordingly, the court grants Ronald LaHue's motion for acquittal as to count eight. *See United States v. Bindley*, 157 F.3d 1235, 1238 (10th Cir. 1998) (quoting *United States v. Jones*, 44 F.3d 860, 869 (10th Cir. 1995) ("To be guilty of aiding and abetting, a defendant

must willfully associate with the criminal venture and aid such venture through affirmative action.")).

C. Dan Anderson

The court denies Mr. Anderson's motion for acquittal because the evidence at trial was sufficient for a reasonable jury to conclude he willfully violated and conspired to violate the Anti-Kickback Act. From the beginning of the BVMG/Baptist relationship, Mr. Anderson understood Baptist's relationship with the LaHues to be centered around patient referrals and what Baptist would have to do to acquire them. The relationship began when Mr. Anderson agreed in principle to pay the LaHues to associate with Baptist. Only after the fee was set did the parties begin attempts to justify the fee. Shortly thereafter, Mr. Anderson approved the LaHues' request to assign Tom Eckard to their practice.

Without more, however, the mere chronology of events (i.e. patients following remuneration) is insufficient to infer that Mr. Anderson "purposely intended to violate the law." What makes the Baptist situation different from the relationships between the other hospitals and BVMG is that Baptist endeavored to involve legal counsel much more extensively in an effort to effectuate the relationship, and those lawyers attempted to put it on a legal footing. As the court recognized in granting the lawyer defendants' motions for acquittal at the close of the government's evidence, and which is applicable as well to the starting point in evaluating the evidence of culpability of the hospital executive defendants,

It is undisputed from the evidence that all the lawyers who dealt with or reviewed these transactions . . . held good faith beliefs that it was possible to facilitate some business relationship that was legal between the hospitals and BVMG. Even if patient referrals were devoutly hoped for and anticipated; even if the volume of patients could be large; even if the parties might never have come together but for Baptist having embarked on a long range plan that depended on attracting nursing home patients, there is nothing in the evidence or the law that would have a priori precluded a legal relationship from being entered into under these circumstances.

The problem here is that a very simple concept, "payment for patients is illegal," became far from simple as Congress, the Executive Branch, and the Courts got more deeply involved. "Remuneration to induce" language invites judicial interpretation as to what these words mean – indeed, the government in this case adamantly maintains that the words require definition as part of the jury instructions. Judicial catch phrases like "one purpose rule" [*see United States v. Greber*, 760 F.2d 68, 69 (3d Cir. 1985)] or "primary purpose rule," the reversals of field by the OIG concerning its own interpretation, the checkered history of the Hanlester [*Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995)] case and the reservation by Congress of a safe harbor provision in the act (the promulgation of regulations concerning which were delayed for a considerable time) all invite lawyers to attempt to devise legal ways for parties to have a relationship which has as a component hoped-for and anticipated referrals. . . .

> There were no decisions from the U.S. Supreme Court or from the Eighth or Tenth Circuits, where the activities in question were going on, to guide them. What the evidence unassailably demonstrated is that [the lawyers] steadfastly maintained to their clients that if fair market value were paid for the doctors' practice or for legitimate consulting services, the relationship passed legal scrutiny. Nothing in the evidence or the law suggests otherwise.

Tr. at 7342-45. The court must examine, therefore, whether Mr. Anderson's actions demonstrate that he caused Baptist to pay more than fair market value for consulting services, whether he knew the consulting services were illegitimate, and whether he knew they were not sufficiently being performed.

The government's evidence is sufficient to show that Mr. Anderson knew the payments he directed were more than fair market value for consulting services, that the services specified ultimately proved to be not entirely bona fide, and that the services specified were not sufficiently being performed. When Mr. Keel recommended modifying the relationship in January of 1986 to reduce the amount of fees paid and accurately specify services to be provided, Mr. Anderson approved the latter recommendation but raised questions about the former. The fees were not reduced. A jury could infer from this evidence that Mr. Anderson refused to reduce the fees even when faced with information that the specified consulting services were not being performed. When Mr. Probst and Mr. McClatchey recommended in 1987 that Mr. Eckard be terminated for tax reasons and because his allegiances

were beginning to shift, Mr. Anderson rejected the recommendation because he was concerned that firing Mr. Eckard would "disrupt or create a problem with the relationship between Baptist Medical Center and [BVMG]." A jury could infer from this evidence that Mr. Anderson cared little whether Mr. Eckard performed duties for the hospital as long as the patients kept coming. In 1991, Mr. Thompson informed Mr. Anderson that the 1986 agreement did not conform with safe-harbor regulations, but could be brought into compliance if the contract were written to require hourly services at a specified rate and if Baptist undertook to extensively document the services actually being performed. Neither of these recommendations were implemented. Mr. Anderson later learned that the LaHues were having difficulty performing some of the services delineated, but Mr. Anderson made no efforts to limit or end the consulting fees he himself had directed. A jury could infer from Mr. Anderson's repeated "torpedoes be damned" attitude toward paying the annual fees, which he personally directed be paid, that he placed little value on the LaHues' consulting and instead cared only about patient referrals.

The most inculpatory evidence as to Mr. Anderson falls near the end of the Baptist/BVMG relationship. After receiving BVMG's termination letter prior to the anticipated BVMG sale to Vencor, Mr. Anderson worked to develop a strategy to replace the BVMG patients but did nothing to replace the LaHues' consulting services. Again, a jury could infer from this evidence that Mr. Anderson placed little value on the consulting services and instead valued BVMG's patients.

D. Dennis McClatchey

The question of whether there is sufficient evidence to support a finding that Mr. McClatchey joined a conspiracy specifically intending to do something the law forbids, purposely intending to violate the law, initially appears close because of his acknowledged association with the other defendants. The issue is whether, on more careful analysis, it is only this mere association that can properly be inferred. *See, e.g., United States v. Austin*, 786 F.2d 986, 988 (10th Cir. 1986) ("A defendant's mere association with conspirators is not enough to support a conspiracy conviction."). In evaluating the motion, the court is ever mindful that it would be entirely improper for it to substitute its judgment for that of the jury. *See United States v. Copus*, 110 F.3d 1529, 1534 (10th Cir. 1997). After thoroughly reviewing the trial record, the court concludes that, even viewing the evidence in the light most favorable to the government and drawing every permissible inference in the government's favor, the evidence was insufficient as a matter of law to support a jury finding beyond a reasonable doubt on the element of intent. Accordingly, the court grants Mr. McClatchey's motion for acquittal.

Mr. McClatchey's position is fundamentally different from the positions of Mr. Anderson and the Drs. LaHue. What is illegal under the Anti-Kickback Act is to offer or pay remuneration to induce referrals, or to solicit or receive remuneration in return for referrals. 42 U.S.C. § 1320a-7b(b). The evidence at trial was overwhelming that it was Mr. Anderson, not Mr. McClatchey, who

offered and paid remuneration to the LaHues. Specifically, Mr. Anderson directed the $150,000 annual payments to the LaHues and Mr. Anderson assigned Mr. Eckard to assist BVMG. Mr. McClatchey played only a peripheral role in the alleged offer and payment scheme because there is simply no evidence that he personally offered or paid or directed any remuneration to induce referrals. As such, the government can obtain a conviction only on a coconspirator liability theory. *See Self*, 2 F.3d at 1085, 1089; *Pinkerton*, 328 U.S. at 640.[11] The evidence was that Mr. McClatchey was in many ways caught in the middle between Mr. Anderson, who (the jury was entitled to find) insisted that the LaHues be paid $150,000 per year and that Mr. Eckard continue to work for BVMG, and Mr. Keel, Mr. McGrath, and Mr. Eckard, who had the day-to-day responsibility for monitoring contract performance.

The government's principal contention at trial was that Mr. McClatchey made the illegal kickback scheme possible by preparing the hospital for the influx of patients and facilitating the hospital's overall relationship with BVMG. He surely did so, as he openly admitted

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[11] That is, Mr. McClatchey's conviction on count three, the substantive count, cannot stand unless he is also guilty of the count one conspiracy. The government cannot support Mr. McClatchey's count three conviction on an aiding and abetting theory because there is no evidence from which a reasonable jury could conclude he did anything material to the Baptist/BVMG relationship after the statute of limitations critical date in July 1993. *See* 18 U.S.C. § 3282 (5 year statute of limitations); *United States v. Jaynes*, 75 F.3d 1493, 1506 (10th Cir. 1996); 18 U.S.C. § 2 (aiding and abetting statute).

when he took the witness stand at trial. The government may not, however, obtain a conviction merely by relying on actions Mr. McClatchey legitimately took as Chief Operating Officer of Baptist Medical Center. There is nothing illegal or susceptible to an inference of criminal intent, for example, for the Chief Operating Officer of a hospital merely to prepare for an expected influx of patients and facilitate a potentially bona fide relationship with a group of doctors from whom patient referrals are expected as a by-product.

The court has reviewed every shred of evidence the government has marshaled against Mr. McClatchey and conducted its own extremely thorough independent review of the record. Even granting the government all the inferences to which it is entitled, the court's efforts have led it to the unmistakable conclusion that the evidence was insufficient to support his conviction. Every time Mr. McClatchey appears in the chronology of events in this case, he is either merely a silent document recipient, acting to bring the BVMG/Baptist relationship into compliance with what the lawyers told him was required, or acting in the normal course of his employment as Chief Operating Officer. To be sure, Mr. McClatchey knew there were grave risks attendant to Baptist's relationship with BVMG. But he also knew that the lawyers had given the basic structure their blessing. Every time there is evidence that Mr. McClatchey learned the relationship drifted too far afield from the lawyers' directions, he took serious and decisive efforts to bring the hospital into compliance.

When the BVMG/Baptist relationship was in its infancy, Mr. McClatchey had very little to do with the day

to day arrangements. Mr. Anderson directed that the remuneration be paid, and Mr. Keel and Mr. Eckard had responsibility to foster and monitor the relationship. Mr. McClatchey was kept up to date with written correspondence, but took almost no direct action. He knew, for example, that Mr. Keel recommended modifying the relationship in early 1986 to reduce the fees and shore up the terms of the contract, but he had little or no substantive involvement in these activities. Mr. Keel, Mr. Eckard, and Ms. Lehr took on those duties. There is no evidence that any involvement Mr. McClatchey did have in connection with shoring up the contract was anything other than legitimate.

As the relationship progressed, Mr. McClatchey acted only in conformance with his understanding of the law. In 1987, Mr. McClatchey received the memo from Deb Grimes informing him that the LaHues were not sufficiently performing services under the contract. Mr. McClatchey said he would "take care of it." He ruffled feathers and hospital front line staff began using the LaHues' services.[12] His actions were entirely consistent with his understanding that the LaHues needed to be performing valid services for the relationship to be legal, and he had every right to rely on the earlier efforts of Mr. Keel, Mr. Eckard, and Ms. Lehr to draft a contract that was legal. Mr. McClatchey also recommended against

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[12] Although Mr. Eckard testified that the pressure to comply with the contract was eventually taken off the hospital front line staff, *see* Tr. at 5570, his testimony is unclear about who took the pressure off and about whether pressure was taken off completely or only in limited areas. It permits no inculpatory inference as to Mr. McClatchey.

increasing the fees to the LaHues in this time period. Moreover, when it later became clear that the Eckard arrangement had tax and other negative implications for the hospital,[13] Mr. McClatchey willingly joined with Mr. Probst to recommend Mr. Eckard's termination.

After the Health Midwest merger, Mr. McClatchey took on a greater role with respect to the Baptist/BVMG relationship, and continued his work to keep it on course. In the summer of 1991, when Mr. Keel made some rather inappropriate suggestions for contract modifications, Mr. McClatchey did not adopt the recommendations but forwarded the ideas to the hospital's lawyers. Later in 1991, when Mr. McGrath told him there were problems with the delivery of services, Mr. McClatchey was surprised and directed Mr. McGrath to check out the problem and report back. In connection with the contract changes Mr. Thompson had recommended, Mr. McClatchey highlighted an area he believed ought not to be part of the contract because he was concerned the activities would not occur. After learning that the Eckard arrangement was a problem, he took decisive action to bring Mr. Eckard back to the hospital.[14]

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[13] No one had identified the Eckard arrangement as a potential Medicare fraud problem in this time period.

[14] Mr. McClatchey's initial inquiries about how to fix the Eckard arrangement without destroying the hospital's relationship with BVMG do not allow for an inference of criminal intent because the evidence is uncontroverted that Mr. McClatchey was trying to make the relationship legal and relied on Mr. Thompson in dealing with Robert LaHue. He suggested that BVMG should pay the hospital for Mr. Eckard's services, and (with Mr. Thompson) made it clear in no uncertain terms

Mr. McClatchey's motion for acquittal is granted because the evidence was insufficient to support the jury's verdict. When Mr. McClatchey's involvement in the BVMG/Baptist relationship is viewed as a whole with all the evidence in the case, his activities allow at most a suspicion of guilt. *See United States v. Valadez-Gallegos*, 162 F.3d 1256, 1262 (10th Cir. 1998) ("The evidence supporting the conviction must be substantial and do more than raise a suspicion of guilt."). The evidence was simply insufficient for a reasonable jury to find Mr. McClatchey specifically intended to join a conspiracy specifically intending to do something the law forbids. The fact of the matter is that the evidence points to only one conclusion: Mr. McClatchey, like Ms. Lehr and Mr. Thompson, believed the relationship between Baptist and BVMG could be a legal one and acted at all times to keep it on the proper side of the law. He is entitled to judgment of acquittal.

E. Unlawful Inducement

Each defendant also claims that the government's proof is insufficient because there was no evidence that the remuneration offered, paid, solicited, and received was "to induce" or "in return for" patient referrals. Each defendant has a slightly different approach to this argument, but the defendants essentially claim that the

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that Mr. Eckard was no longer BVMG's free employee. Mr. Eckard, of course, continued to facilitate doctor/hospital relationships, but that was to be expected from a hospital marketing specialist. The evidence is uncontroverted that Mr. Eckard's continuing to perform services specific to BVMG upon his return to Baptist was entirely his own doing.

government's tactic of showing remuneration paid and patients referred is insufficient unless the government proves beyond a reasonable doubt that the remuneration and patients are somehow linked. The court agrees with the defendants' legal proposition, but concludes that the government's proof was sufficient to provide the necessary link. Accordingly, the motions to acquit on this basis are denied.

The jury instructions on the element of inducement were explicit:

> In order to sustain its burden of proof against the hospital executives for the crime of violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration offered or paid remuneration with the specific criminal intent "to induce" referrals. To offer or pay remuneration to induce referrals means to offer or pay remuneration with intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must, at least in part, have been the reason the remuneration was offered or paid.
>
> On the other hand, [the hospital executive defendants] cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes. Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law. There must be an offer or payment of remuneration to induce, as I have just defined it.

Jury Instruction No. 32; *see also* Jury Instruction No. 33 (as to doctors, statute requires government to prove remuneration "in return for" patient referrals).

The court believes the evidence was easily sufficient for a jury to infer that remuneration was offered, paid, solicited, or received to induce and in return for patient referrals, as those terms are defined in the court's instructions. The LaHues all but explicitly told University Hospital that higher payment offers at Baptist would cause them to move their patients. Mr. Anderson began directing $75,000 per year to the LaHues before the parties had ever established what the LaHues would do for that money. Mr. Eckard described the consulting services the LaHues provided at Baptist and other hospitals as "minimal to none." For Mr. Anderson, the $75,000 payments and Mr. Eckard's services were the starting point. The varying justifications were developed only later.

The defendants argue they are entitled to acquittals because the government provided no evidence that the value of the LaHues' services was less than the amount the hospitals paid. The defendants relied on testimony from medical experts like Dr. Nevada Lee who explained that the services Baptist was paying the LaHues for had real value. The government, in contrast, had no single valuation witness who testified that the hospital paid more than fair market value for the consulting services. In fact, the evidence was overwhelming that the services specified in the consulting contracts, on their face, were not grossly disproportionate with the fees paid. The defendants assert that one of the government's trial themes, a "search for value," impermissibly saddled them

in the jury's eyes with an evidentiary burden that should have been placed on the government.

This argument has no merit. Were the government's case based solely on a disparity of value between remuneration paid and services rendered, the defendants' argument might be more persuasive.[15] The government was not, however, required to prove anything about value. The government was required to prove that remuneration was offered, paid, solicited, or received to induce or in return for patient referrals. *See* 42 U.S.C. § 1320a-7b(b); Jury Instruction Nos. 32, 33. The government's evidence, as outlined above, is sufficient to allow a reasonable jury to make the necessary inference. The defendants' proof that the consulting services had value was merely evidence the jury was entitled to weigh in considering whether to credit the government's evidence. The jury apparently gave the defendant's proffered "fair market value" justification little weight, as it was perfectly entitled to do.

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[15] The matter would still be of some debate, however. For example, it would have been permissible for the jury to infer lack of fair market value from the retrospective process of setting fees first and specifying services later, and from the evidence that the front line people at the hospital who were supposed to benefit from the LaHues' services had little interest in actually receiving them. The jury certainly could have considered the testimony given at trial about reasonable value for physician services and the amount of time the government's evidence showed that the LaHues devoted to carrying out their duties under the consulting contracts.

III. Motions for New Trial

The defendants assert a number of errors which they believe entitle them to a new trial. Specifically, they contend that (1) there was a prejudicial variance from the indictment, (2) they are entitled to relief from misjoinder and prejudicial joinder, (3) various instructional errors prejudiced them, (4) the court erred in admitting the government's proffered Fed. R. Evid. 801(d)(2)(E) evidence under a joint venture conspiracy theory rather than a criminal purpose conspiracy theory, and (5) various forms of alleged prosecutorial misconduct prejudiced them. The court denies these motions except as to Mr. McClatchey, to whom, in the alternative to its acquittal of him, *see* Fed. R. Crim. P. 29(d), the court grants a new trial on the variance issue.

A. Standard

Fed. R. Crim. P. 33 provides that the court may grant a new trial to a defendant if required in the interest of justice. Any error which would require reversal on appeal is a sufficient basis for granting a new trial. *United States v. Stiner*, 765 F.Supp. 663, 664 (D. Kan. 1991), *aff'd*, 952 F.2d 1401 (10th Cir. 1992). A motion for a new trial is not viewed with favor, however, and should be granted with great caution. *United States v. Chatman*, 994 F.2d 1510, 1518 (10th Cir. 1993). The decision to grant a motion for a new trial lies within the trial court's discretion. *United States v. Custodio*, 141 F.3d 965, 966 (10th Cir.), *cert. denied*, 119 S.Ct. 243 (1998).

B. Variance

The defendants claim that they are entitled to a new trial because of a prejudicial variance between the indictment and the government's proof. Specifically, Mr. Anderson and Mr. McClatchey claim that they were prejudiced by spillover from what they view as the "other hospitals" conspiracies originally charged against them as part of the broad count one conspiracy but later cut out of count one when the court, at the defendants' request, found at trial that no reasonable jury could find that Mr. Anderson and Mr. McClatchey were part of the broad conspiracy charged.[16] They also claim prejudicial variance from the government's indicting the attorneys yet failing to prove the attorneys criminally culpable. Finally, they claim that the court should have given a multiple conspiracy instruction. After careful review, the court does not believe Mr. Anderson suffered prejudice from the variance and accordingly denies his motion for a new trial. The court reaches the opposite conclusion as to Mr. McClatchey, and therefore grants Mr. McClatchey's motion for a new trial as an alternative to his acquittal.

The Fifth Amendment grand jury guarantee is not violated if a defendant is convicted upon evidence tending to show a more narrow scheme than that contained in the indictment, provided that the narrower scheme is fully included within the indictment. *See United States v.*

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[16] Although the Drs. LaHue join in Mr. Anderson's and Mr. McClatchey's motions by reference, these issues do not affect them because they do not claim to have suffered, nor did they suffer, any prejudice from the variance.

Wright, 932 F.2d 868, 874 (10th Cir. 1992) (citations and internal quotation marks omitted) (holding that trial court's approach of presenting conspiracy charge to jury on only the limited conspiracy supported by the evidence rather than the broad conspiracy alleged in the indictment was proper); *see also United States v. Hornung*, 848 F.2d 1040 (10th Cir. 1988) (appropriate to submit narrowed conspiracy charge to jury where evidence does not support broad conspiracy alleged). On the other hand, a variance occurs

> when the evidence adduced at trial establishes facts different from those alleged in the indictment. . . . However, a variance is not fatal to the government's case unless the variance affects the substantial rights of the accused. . . . Accordingly, where a single conspiracy is charged in the indictment, and the government proves only multiple conspiracies, a defendant who suffers substantial prejudice must have his conviction reversed.
>
> A defendant's substantial rights are affected in the context of a variance when the jury determines a defendant's guilt by relying on evidence adduced against coconspirators who were involved in separate conspiracies. . . . In evaluating whether a potential prejudicial spillover impermissibly affected the fairness of a trial in which a variance occurred, we have considered the following factors: (1) whether the proliferation of separate conspiracies in the case affected the jury's ability to segregate each defendant's individual actions and participation, (2) whether the variance caused confusion among the jurors as to the limited use of certain evidence, and (3)

> the strength of the evidence underlying the conviction.

United States v. Edwards, 69 F.3d 419, 432-33 (10th Cir. 1995). (citations and internal quotation marks omitted); *see also Wright*, 932 F.2d at 874 ("[A] variance is not harmless if the evidence adduced against co-defendants involved in separate conspiracies was more likely than not imputed to the defendant by the jury."). Jury instructions may safeguard a defendant from any impermissible prejudice. *Id.*

The court agrees with the defendants that there were two variances in this case. The first was the variance the court recognized at trial when it narrowed the count one conspiracy. The second was the variance with respect to the government's failure of proof as to the lawyer defendants. In a typical case, the mere fact that the government fails to convict one or more alleged coconspirators does not create a variance. *See United States v. Diana*, 605 F.2d 1307, 1310 (4th Cir. 1979) (jury acquittal of codefendant did not create variance because "there was evidence to show a single four-link conspiracy even though the jury did not convict the members of the fourth link in the chain."). In this case, however, the government failed even to submit enough proof to create a jury issue. The government obtained indictment on the theory that the lawyer defendants were active participants in a conspiracy to create sham contracts to paper over a kickback scheme. The evidence at trial fell far short of proving any impropriety on the part of the lawyers.[17] Accordingly, the

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[17] Despite the court's acquittal of the lawyer defendants at the close of the government's evidence, the government stubbornly maintained in its closing argument and continues to

court believes a variance occurred. *See Edwards*, 69 F.3d at 432 ("A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment.").

The court does not believe the variance with respect to the other hospitals affected Mr. Anderson's substantial rights sufficient to warrant a new trial. As the court explained in denying the defendants' motion for dismissal for variance at the close of the government's case,

> The Court believes . . . that the dismissal issue is not even close. The evidence adduced at trial simply tends to show a narrower scheme than the one alleged in the indictment. The Court believes there will be minimal prejudice in going forward without dismissal because there are not a proliferation of separate conspiracies in the case; there are at most two types of conspiracy. There was evidence of one conspiracy at

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maintain in its post trial briefing that the lawyer defendants were criminally involved in the alleged scheme. *See* Tr. at 9762 ("The evidence in this case has been that the attorneys were well aware that the – that this was a paying for patients deal and worked to develop agreements that covered up that fact."); *see also* Govt. Response Brief (Doc. 443), at 169 (arguing, despite court's ruling that inference of criminal intent on the part of the lawyer defendants was unreasonable as a matter of law, that prosecutor's closing argument was proper because "[p]rosecutors . . . may argue reasonable inferences from the evidence that the jury has seen and heard."). In the court's thorough review of the evidence at the close of the government's case and in the court's even more exhaustive review of the evidence in connection with the pending motions, it found not one shred of evidence that even comes close to indicating that the lawyer defendants acted with specific intent to violate the law.

> Baptist allegedly involving all the Defendants and there was evidence of separate conspiracies at the non-Baptist hospitals, involving at most the LaHues and one or more unindicted coconspirators. Moreover, the government has presented evidence in a cogent, easily separable fashion, and there is little risk of jury confusion between the two types of conspiracies. In addition, the Court has given limiting instructions at the request of the Defendants as to each of the witnesses and with regard to each of the items of evidence presented as to those counts that involve the non-Baptist hospitals.

Tr. at 7350-51. The evidence against Mr. Anderson, if not overwhelming, was substantial and the court does not believe the case was so close that Mr. Anderson suffered prejudicial spillover from the variance. *See also United States v. Austin*, 774 F.2d 99, 101 (5th Cir. 1985) ("The present case differs from *Kotteakos [v. United States*, 328 U.S. 750, 772 (1946) (proliferation of separate conspiracies and defendants required reversal)] . . . in one significant respect. In *Kotteakos* . . . , the trial judge did not narrow the general conspiracy charge to conform to the proof at trial. The jury was allowed to consider the broad conspiracy even though there was no evidence to show that the defendant had participated in it. The danger of transference of guilt from one defendant to another unrelated defendant was very real. In the present case, however, the trial judge limited the conspiracy charge. . . . The judge instructed the jury not to consider any other agreement . . . or the alleged participation of [alleged coconspirator] Fontenot. These instructions and the careful delimitation

of the conspiracy charge submitted to the jury removed any danger of transference of guilt.").[18]

The variance with respect to the lawyer defendants does not entitle Mr. Anderson to a new trial, either. There was sufficient evidence to convict him independent of the sham contract theory. *See supra*, part II.C. The evidence was sufficient for a jury to find that, despite the attempts of Ms. Lehr and Mr. Thompson to keep the relationship on the right side of the line, Mr. Anderson willfully paid remuneration to induce the LaHues to refer Medicare patients to Baptist. Accordingly, the court denies Mr. Anderson's motion for a new trial on variance grounds.

The court reaches a different conclusion as to Mr. McClatchey because, as the court explained *supra* at part II.D, Mr. McClatchey's involvement in the alleged scheme was heavily dependent on the scope of the lawyer defendants' involvement. Every time Mr. McClatchey appears in the chronology of events, he is either a silent document recipient, acting to bring the BVMG/Baptist relationship into compliance with what the lawyers told him was

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[18] The court recognizes, however, that Mr. Anderson suffered some greater prejudice than he would have suffered if count one of the indictment had made no reference to the other hospitals at all. As charged, count one and the government's opening statement improperly linked him with the LaHues as to the other hospitals. Nevertheless, in a joint trial involving Mr. Anderson and the LaHues that did not involve conspiracy or other charges at the other hospitals, the court likely would have admitted evidence related to the other hospitals on the limited issue of the LaHues' intent at Baptist. *See infra* Part III.C.; Fed. R. Evid. 404(b). Because the evidence was not close as to Mr. Anderson, however, the court does not find that this slight prejudice affected Mr. Anderson's substantial rights.

required, or acting in the normal course of his employment as Chief Operating Officer. In light of the government's stubborn closing argument to the effect that the lawyers were guilty, the court believes the variance affected Mr. McClatchey's substantial rights.

Also a factor in the court's decision to grant Mr. McClatchey a new trial, albeit a very minor one, is the danger for spillover from the other hospitals evidence. Were this factor standing alone, the court would not grant Mr. McClatchey a new trial. However, one of the circumstances to evaluate in determining whether a defendant's substantial rights are affected by spillover in a variance context is "the strength or weakness of the evidence underlying the jury's conviction." *Wright*, 932 F.2d at 876. This circumstance weighs heavily in Mr. McClatchey's favor because the evidence against him was weak.[19] On the other hand, and as the court explained above in connection with Mr. Anderson, the other two circumstances to evaluate, whether there were a proliferation of separate conspiracies and whether there was a risk of jury confusion, *see id.*, weigh against a new trial based on spillover. In any event, the court grants Mr. McClatchey's

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[19] Although evidence concerning the LaHues' solicitations at the other hospitals causes no severance concerns because it would likely have been admitted against them in a joint trial with Mr. McClatchey subject to a limiting instruction prohibiting consideration against Mr. McClatchey, *see infra* part III.C, the count one allegations and the government's opening statement actually linking Mr. McClatchey to the other hospitals make it more likely the jury was led astray by spillover in the variance context in light of the lack of evidence of his criminal intent.

motion for a new trial in the alternative to its judgment of acquittal.

The defendants also claim prejudice from the court's refusal to give a multiple conspiracy instruction. *See Edwards*, 69 F.3d at 433 ("A multiple conspiracy charge instructs the jury to acquit if it finds that the defendant was not a member of the indicted conspiracy but rather was involved in another conspiracy.") (citation omitted). This argument is without merit because the Tenth Circuit does not require such an instruction "as long as the instructions informed the jury that 'the government had the burden of proving beyond a reasonable doubt the [single] conspiracy as alleged, and that the evidence should be considered separately as to each defendant.' " *Id.* (citations omitted). The court's instructions clearly comply with Tenth Circuit law. *See* Instruction Nos. 3 and 21. Moreover, to the extent the defendants argue that the jury should have been instructed to acquit if it failed to find the broad conspiracy originally alleged in count one, their argument is without merit because the court found dismissal of the case for the count one "other hospitals" variance to be inappropriate as a matter of law. *See* Tr. at 7350-51.

C. Severance

The defendants, in particular Mr. Anderson,[20] claim that the court erred in denying their motion for severance

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[20] Mr. Anderson specifically moves for a new trial on the issue of prejudicial joinder. The other defendants incorporate his arguments by reference. The court does not consider the motion as to the Drs. LaHue, however, because they do not

based on misjoinder, *see* Fed. R. Crim. P. 8(b), and prejudicial joinder. *See* Fed. R. Crim. P. 14. These arguments are without merit.

Joinder under Rule 8(b) is proper where defendants "are alleged to have participated in the same act or transaction or the same series of acts or transactions." The test for proper joinder, according to the Tenth Circuit, is whether there is "a common thread to each of the defendants." *United States v. Rogers*, 921 F.2d 975, 984 (10th Cir. 1990) (citation omitted). The link "may be established by common evidence as to various counts." *Id.* (citations omitted). "In conspiracy cases, the general rule is that persons indicted together should be tried together." *Id.* (citation omitted). The Tenth Circuit endeavors to "strike a balance in favor of joint trials." *Id.* (citation omitted).

The court denies the defendants' motion for severance on misjoinder grounds because it believes counts five through nine were properly joined with counts one through three. Even though the court ruled that no reasonable jury could conclude the hospital executive defendants were guilty of conspiring to violate the Anti-Kickback Act at the other hospitals, the evidence is uncontroverted that they knew the LaHues were approaching those other hospitals. *See United States v. Anderson*, No. 98-20030-01/-07-JWL, 1999 WL 79652, at *2 (D. Kan. Jan. 12, 1999) ("The defendants concede that knowledge is a key element in discerning the propriety of

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claim to have suffered prejudice from being joined with one another or with the hospital executive defendants.

8(b) joinder."). Moreover, counts one through nine were all highly dependent on the common testimony of one witness – Tom Eckard. The court believes joinder under Rule 8(b) was proper.

Rule 14 provides relief from prejudicial joinder. Severance under Rule 14 is committed to the sound discretion of the trial judge. *United States v. Johnson*, 130 F.3d 1420, 1427 (10th Cir. 1997). Severance is appropriate only where a defendant can make a "strong showing of prejudice" from being tried together with his or her codefendants. *United States v. Edwards*, 69 F.3d 419, 434 (10th Cir. 1995).

> Prejudice occurs when there is a serious risk that a joint trial [will] compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. . . . Neither a mere allegation that defendant would have a better chance of acquittal in a separate trial, nor a complaint of the "spillover effect" of damaging evidence is sufficient to warrant severance.

Id. (citations and internal quotation marks omitted).

The court denies the motion for severance on prejudicial joinder grounds because it does not believe Mr. Anderson or Mr. McClatchey suffered the high level of prejudice the law requires. Mr. Anderson's arguments are essentially a rehash of his pretrial arguments claiming unfairness in being tried with the LaHues and the lawyers. The court denied Mr. Anderson's motion then, and it denies it again now. The facts of this case, while complicated and voluminous, were presented in an easily

separable form.[21] Moreover, the court's instructions to the jury, requiring separate consideration of the evidence as to each defendant, minimized any possible prejudice.[22]

D. Jury Instructions

The defendants claim error in a number of different jury instructions. The court finds these arguments to be

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[21] The court does not believe the defendants suffered any unfair prejudice in the severance context in the government's closing argument references to the other hospital evidence as evidence sufficient to infer the criminal intent of the LaHues at Baptist. Having carefully reviewed the objected to rhetoric, the court concludes that it properly focused the attention of the jury on the mindset of the doctor defendants and did not improperly implicate the hospital executive defendants. *See United States v. Brewer*, 630 F.2d 795, 803 (10th Cir. 1980) ("Where a case is 'vigorously argued by both sides . . . , [t]he closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture.' ") (citations omitted). Moreover, the defendants did not object to the references contemporaneously; the plain error rule applies and the court finds no plain error. *See United States v. Olano*, 113 S. Ct. 1770 (1993); Fed. R. Crim. P. 52(b) (plain error rule).

[22] The court notes that the evidence of other hospital solicitations by the LaHues would likely have been admissible against the LaHues (with proper limiting instructions) in a trial of the collective defendants only on the Baptist-related counts. *See* Fed R. Evid. 404(b); 403. The probative value as to their intent, a crucial issue, was very high and the unfair prejudicial effect on them would have been very low. Of course, just as occurred here, that evidence would not have been admitted against the hospital executive defendants. Thus, even if the non-Baptist counts had been severed, Mr. Anderson and Mr. McClatchey would have had to contend with the same minimal spillover for which they now seek a new trial.

without merit. When determining the adequacy of jury instructions, the court must consider the instructions as a whole to determine whether they adequately state the law and provide the jury with ample understanding of the issues and controlling principles of law. *United States v. Edwards*, 69 F.3d 419, 433 (10th Cir. 1995).

1. Instruction Nos. 32 and 33[23]

The defendants claim that Jury Instruction Nos. 32 and 33 were erroneous because they allowed the jury to convict if only "one purpose" of the remuneration offered, paid, solicited, or received was to induce or in return for Medicare patient referrals.[24] *See United States v.*

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[23] Instruction Nos. 32 and 33 were parallel instructions, with Instruction No. 32 applicable to the hospital executive defendants under the "offer or pay" prong of the statute, *see* 42 U.S.C. § 1320a-7b(b)(2), and Instruction No. 33 applicable to the doctor defendants under the "solicit or receive" prong of the statute. *See* 42 U.S.C. § 1320a-7b(b)(1).

[24] Instruction No. 32 is reprinted verbatim *supra* at section II.E. Instruction No. 33 reads as follows:

> [I]n order to sustain its burden of proof against the doctor defendants for violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration solicited or received remuneration with specific criminal intent that the remuneration be "in return for" referrals. To solicit or receive remuneration in return for referrals means to solicit or receive remuneration with intent to allow the remuneration to influence the reason and judgment behind one's patient referral decisions. The intent to be influenced must, at least in part, have been the reason the remuneration was solicited or received.

Greber, 760 F.2d 68, 71 (3d Cir. 1985); *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989). According to the defendants, the law allows conviction only if the "primary purpose" of the remuneration was to induce or in return for Medicare patient referrals. *See United States v. Bay State Ambulance & Hosp. Rental Serv.*, 874 F.2d 20, 30 (1st Cir. 1989); *United States v. Jain*, Nos. 94-00087-01, 94-00087-02-CR-W-6 (W.D.Mo.1995), *conviction aff'd. in part and rev'd in part on other grounds*, 93 F.3d 436 (8th Cir. 1996).

The court thoroughly considered its ruling on this issue at trial and is persuaded that the instructions given were proper. This case was a case of first impression in the Tenth Circuit. Accordingly, the court drafted Instruction Nos. 32 and 33 after extensive pretrial and trial briefing and full oral argument by the parties. It carefully considered Congress' intent in drafting the statute, the views expressed in relevant legal commentary, and the insights to be drawn from the case law on the subject. *See, e.g., United States v. Starks*, 157 F.3d 833 (11th Cir. 1998); *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996); *Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995); *United*

On the other hand, defendants Robert LaHue and Ronald LaHue cannot be convicted merely because they received remuneration wholly in return for services and also decided to refer patients to the hospital. Likewise, mere referral of patients because of oral encouragement or because of a belief that the place to which the patients are to be referred is attractive does not violate the law. There must be a solicitation or receipt of remuneration in return for referrals, as I have just defined it.

States v. Bay State Ambulance & Hosp. Rental Serv., 874 F.2d 20 (1st Cir. 1989); *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985). In the end, the court wrote instructions that it believes accurately capture the essence of what Congress prohibited when it enacted the Anti-Kickback Act. Namely, the instructions make clear that what is prohibited is the offering, payment, solicitation, or receipt of remuneration when the remuneration is intended to influence patient referral decisions. *See Greber* 760 F.2d at 71 ("Even if the physician performs some service for the money received, the potential for unnecessary drain on the Medicare system remains. The statute is aimed at the inducement factor."), *quoted in Bay State Ambulance & Hosp. Rental Serv.*, 874 F.2d at 30. The instructions also make clear that the statute does not prohibit financial relationships where the remuneration is intended wholly for other purposes but patient referrals are nonetheless otherwise encouraged, hoped for, or made. *See Hanlester Network*, 51 F.3d at 1397 ("mere encouragement would not violate the statute."). The instructions incorporate the apparent Congressional mandate that any remuneration offered, paid, solicited, or received for an improper purpose is illegal, yet the instructions also protect healthcare professionals from being convicted merely because they are astute businesspeople. Despite the defendants' observations and arguments that the court's interpretation of the statute may prohibit many beneficial relationships in addition to those that threaten the integrity of Medicare, the court believes that the extremely broad language of the statute simply does not allow for judicial narrowing. *See* 42 U.S.C. § 1320a-7b(b) ("Whoever knowingly and

willfully solicits or receives any remuneration . . . in return for [Medicare patient referrals] [and] [w]hoever knowingly and willfully offers or pays any remuneration . . . to induce [Medicare patient referrals].").[25] The defendants will need to make their arguments in another forum.

2. Instruction No. 30

The defendants claim error in the court's instruction that the hospital defendants could be convicted if they offered or paid remuneration "to induce" patient referrals despite the indictment's failure to recite the statutory magic words. The defendants point out that the narrative portion of the indictment explicitly references only a scheme to offer, pay, solicit, or receive remuneration "in return for" patient referrals. By charging the jury with

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[25] The court believes the Anti-Kickback Act is not a statute like the one in *United States v. Sun-Diamond Growers*, 119 S. Ct. 1402, 1410 (1999), that can "linguistically be interpreted to be either a meat axe or a scalpel." The statute is simply a meat axe. Nor is the Anti-Kickback Act a statute like the mail and wire fraud statutes where the court must go beyond the language of the statute to infer that Congress intended to incorporate the established meaning of a common law term of art. *Neder v. United States*, 119 S. Ct. 1827, 1840 (1999) (mail and wire fraud statutes require government to show materiality despite absence of the term in statutory language because common law fraud required materiality). Relative to the centuries of baggage accompanying the word "defraud," the words "to induce" and "in return for" are newcomers as legal terms of art. The court will not engraft a materiality requirement on the Anti-Kickback Act when there is no indication that Congress intended these words to incorporate such a requirement.

language not explicitly included in the indictment, the defendants claim, the court constructively amended the indictment and violated their Fifth Amendment rights.

This argument has no merit because, despite the narrative language in the indictment, the indictment specifically cited § 1320a-7b(b)(2), the offer or payment to induce prong of the statute. Moreover, the indictment read as a whole fairly apprizes the defendants that the hospital executive defendants were charged with offering or paying remuneration to induce. *See United States v. Mobile Materials, Inc.*, 871 F.2d 902, 906-07 (10th Cir.) (court must view indictment as a whole, with an emphasis on common sense rather than technicalities), *modified on other grounds*, 881 F.2d 866 (10th Cir. 1989) (en banc). Accordingly, the defendants are not entitled to a new trial on this basis.

3. Instruction Nos. 36 and 37

The defendants renew their contention that Instruction Nos. 36 and 37, the instructions defining the "willfulness" element of the Anti-Kickback Act and the proper means by which the jury could infer willfulness, were improper because the court failed to instruct pursuant to *Cheek v. United States*, 498 U.S. 192 (1991) and *Ratzlaf v. United States*, 510 U.S. 135 (1994). Under the willfulness element of the statute at issue in Cheek, a defendant cannot be convicted of willful violation of the tax laws unless he or she is aware of the specific provision of the tax code that he or she was charged with violating. *Cheek*, 498 U.S. at 201. Similarly, under the willfulness element of the statute at issue in *Ratzlaf*, a defendant cannot be

convicted of willful violation of currency structuring laws unless the defendant knows that the structuring of cash transactions to avoid statutory reporting requirements is unlawful. *Ratzlaf*, 510 U.S. at 138. The defendants contend that the Anti-Kickback Act requires the government to make an equivalent showing of intent.

The court has previously rejected the defendants' arguments on this point and now denies the defendants' motions because they argue for a result that the Supreme Court squarely rejected in a recent decision. In *United States v. Bryan*, 118 S. Ct. 1939, 1945-47 (1998), the Supreme Court considered the appropriate definition of the term "willfully" in connection with 18 U.S.C. § 924(a)(1)(D), a statute making anyone who willfully violates, inter alia, 18 U.S.C. § 922(a)(1)(A), which forbids dealing in firearms without a federal license, subject to felony charges. *Bryan* distinguished *Cheek* and *Ratzlaf* by noting:

> Both . . . cases . . . involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we held that [the statutes at issue in *Cheek* and *Ratzlaf*] "carv[e] out an exception to the traditional rule" that ignorance of the law is no excuse and require that the defendant have knowledge of the law. *The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions in* [Cheek] *and* Ratzlaf *is not present here because the jury found that this petitioner knew that his conduct was unlawful.*

Bryan, 118 S. Ct. at 1947 (emphasis added). The situation is the same here. In order to convict any defendant of the

crimes charged, the jury was required to find that that defendant "specifically intend[ed] to do something the law forbids, purposely intending to violate the law." Instruction No. 36; *see also United States v. Starks*, 157 F.3d 833 (11th Cir. 1998) (applying *Bryan* in Anti-Kickback context and concluding that statute did not require proof that defendant acted with knowledge of the Anti-Kickback Act); *see also United States v. Jain*, 93 F.3d 436, 440-41 (8th Cir. 1996) (pre-Bryan case approving instruction substantially similar to this court's instruction); *United States v. Dashney*, 117 F.3d 1197, 1201 (10th Cir. 1997). Thus, to convict, the jury was required to find that the defendants knew that their conduct was unlawful. The danger of convicting them based on apparently innocent activity is not present here.

Moreover, even if a *Cheek/Ratzlaf* type instruction were appropriate here, the error was harmless. *See Neder v. United States*, 119 S. Ct. 1827, 1836-37 (1999). The issues in this case had nothing to do with whether the defendants were aware of the Anti-Kickback Act. The defendants at trial readily admitted they knew about the Anti-Kickback Act. They made no claim then and they make no claim now that they were blind-sided by the Act's existence. The essence of the defendants' case was that they were doing everything they could to comply with the dictates of a law they knew about but had difficulty understanding and applying. The issue was whether they knew their conduct violated a law the evidence overwhelmingly indicated they knew about. Accordingly, the defendants' motion for a new trial on these grounds is denied.

4. Instruction Nos. 7 and 21

Mr. Anderson claims that Jury Instruction No. 7, Jury Instruction No. 21, and the instruction given at the close of the government's case might have allowed jury confusion as to the scope of the count one conspiracy. In Instruction No. 7, the court charged the jury that the non-Baptist evidence could be considered only against the LaHues on the substantive counts for which it was offered, and on count one only as to the intent of the LaHues in connection with their dealings with Baptist. In the instruction at the close of the government's case, the court charged the jury that the non-Baptist evidence could be considered only against the LaHues, without limiting the jury's consideration to the issue of intent. In Instruction No. 21, the court charged the jury that it must acquit on the conspiracy charge unless the government proved the specific conspiracy charged at Baptist.

The court rejects this argument. Indeed, it borders on frivolous. Taken as a whole, the jury instructions clearly explain the scope of the count one conspiracy that remained at the close of the evidence. Moreover, to the extent Mr. Anderson argues that the jury should have been charged that the hospital defendants were entitled to acquittal if the evidence failed to prove the broad, seven hospital conspiracy originally charged in the indictment, his argument is without merit for the reasons explained *supra*, section III.B.

5. Instruction No. 24

The defendants claim two errors with respect to Instruction No. 24, which instructed the jury on the elements of *Pinkerton* liability.[26] First, they claim that it was error to give the *Pinkerton* instruction because there were no *Pinkerton* allegations in the indictment. Second, they claim that the instruction given was erroneous because it failed to instruct the jury that *Pinkerton* liability was appropriate only if the predicate offense fell within the scope of the unlawful agreement and reasonably could have been foreseen to be a necessary or natural consequence of the agreement.

These arguments do not entitle the defendants to a new trial. The first claim has no merit because the government need not allege Pinkerton liability to obtain a *Pinkerton* conviction. *See United States v. Self*, 2 F.3d 1071, 1085, 1089 (10th Cir. 1993) (conspiracy allegations in an indictment allowed court to affirm defendant's conviction for a substantive offense committed by defendant's coconspirator even though the indictment did not specifically allege *Pinkerton* liability as to the substantive count). The second claim has no merit because the court's instructions, taken as a whole, were correct. *See United States v. Edwards*, 69 F.3d 419, 433 (10th Cir. 1995) (court must consider the instructions as a whole to determine whether they adequately state the law and provide the

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[26] *Pinkerton* liability is a shorthand reference to the concept established in *Pinkerton v. United States*, 328 U.S. 640, 647 (1946), that a conspirator is liable for the reasonably foreseeable acts of his coconspirators committed during the course of and in furtherance of the conspiracy.

jury with ample understanding of the issues and controlling principles of law). The court gave the following *Pinkerton* instruction:

> A member of a conspiracy who commits another crime during the existence or life of the conspiracy and who commits this other crime in order to further or somehow advance the goals or objectives of the conspiracy, may be found by you to be acting as the agent of the other members of the conspiracy. The illegal actions of this person in committing this other crime may be attributed to other individuals who are then members of the conspiracy. Under certain conditions, therefore, a defendant may be found guilty of this other crime even though he or she did not participate directly in the acts constituting that offense.
>
> If you find that the government has proven that a particular defendant is guilty of the conspiracy as charged in Count 1 of the indictment, beyond a reasonable doubt, you may also find that defendant guilty of the crimes alleged in Counts 2 and 3 of the indictment in which he or she is charged, provided that you find that the essential elements of that count as defined in these instructions have been established beyond a reasonable doubt and, provided further, that you also find beyond a reasonable doubt, that:
>
> FIRST: the substantive offense of violating the Anti-Kickback statute as described in Counts 2 or 3 of the indictment was committed by a member of the conspiracy;

> SECOND: the substantive crime was committed during the existence or life of and in furtherance of the goals or objectives of the conspiracy; and
>
> THIRD: at the time that this substantive offense was committed, the defendant under consideration was a member of the conspiracy.

Instruction No. 24. This instruction is drawn verbatim in all material respects from the pattern instruction given in Devitt, Blackmar, & O'Malley, *Federal Jury Practice and Instructions, Criminal 4th* § 28.10 (1990). Although the Tenth Circuit has not directly weighed in on the issue, *cf. United States v. Willis*, 102 F.3d 1078, 1083 (10th Cir. 1996) ("the co-conspirator has criminal responsibility unless 'the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.' ") (quoting *Pinkerton*, 328 U.S. at 647-48, 66 S.Ct. at 1184), a number of federal appellate courts have approved instructions identical in all material respects to the court's instruction here. *See United States v. Aramony*, 88 F.3d 1369, 1381 (4th Cir. 1996); *United States v. Vasquez*, 858 F.2d 1387, 1393 (9th Cir. 1988); *United States v. Manzella*, 791 F.2d 1263, 1267 (7th Cir. 1986) (Pinkerton instruction nearly identical to this court's instruction "contain[ed] every element of the *Pinkerton* doctrine, arrayed in an order calculated to maximize the likelihood that the jury will grasp this complicated concept."). *But see United States v. Turcks*, 41 F.3d 893, 897 (3d Cir. 1994) (error not to

give foreseeability instruction, but failure did not amount to plain error sufficient to warrant reversal); *United States v. Broadwell*, 870 F.2d 594, 603 (11th Cir. 1989) (error not to give foreseeability instruction, but error was harmless).

In any event, even if the court's instruction was erroneous, the error was harmless because the substantive offenses alleged and proven in counts two and three were also the alleged and proven objects of the conspiracy. *See Willis*, 102 F.3d at 1083 ("the co-conspirator has criminal responsibility unless 'the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy.' "); *Broadwell*, 870 F.2d at 603. Accordingly, the defendants' motion is denied as to their *Pinkerton* argument.

E. Coconspirator Hearsay

The defendants claim prejudicial error in the admission of a great deal of evidence as nonhearsay pursuant to Fed. R. Evid 801(d)(2)(E), the coconspirator hearsay exclusion from the hearsay rule. The court admitted this evidence on a joint venture, or agency, theory and held that Rule 801(d)(2)(E) does not require a showing that the alleged conspiracy was for criminal ends:

> [M]y findings under 801(d)(2)(E) . . . are that the five Defendants who remain in the case, along with Ms. Lehr, Mr. Thompson, Mr. Probst, Mr. McGrath and Mr. Eckard, . . . all were participants of a common plan to put together and facilitate and operate and carry out the relationship of Baptist Medical Center and Blue Valley Medical Group for the continuum of care. They participated in a joint venture, if you will, for

> the purposes of 801(d)(2)(E). And whether there was a criminal intent on the part of any or all of those individuals is something which . . . I need not reach. . . . Therefore, the statements of those individuals that were made in the course of that relationship and in furtherance of that relationship are properly admissible against the five Defendants in this case.

Tr. at 9624-25; *see also United States v. Layton*, 855 F.2d 1388, 1398 (9th Cir. 1988). The defendants contend the court's ruling was improper because they believe the hearsay exclusion requires the government to prove by a preponderance of the evidence[27] not only that the declarants were involved in a joint venture, but also that they were involved in a criminal conspiracy. The court does not agree.

This issue is one of first impression in the Tenth Circuit. The court adopts the well reasoned analysis of Judge Alarcon set out in the *Layton* case and believes that the Tenth Circuit, if faced with the question, would agree with that analysis as well. *Layton*, 855 F.2d at 1398-1400. The rule is rooted in agency principles, as are its siblings, Rules 801(c) and 801(d). The court rejects the overly cynical view that 801(d)(2)(E)'s relaxation of hearsay standards is really based on a perceived need to convict

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[27] Evidence proffered pursuant to Rule 801(d)(2)(E) is not admissible unless the trial court finds by a preponderance of the evidence that, among other requirements, a conspiracy existed. *See United States v. Bourjaily*, 483 U.S. 171, 177 (1987). *Bourjaily* does not address whether existence of a criminal conspiracy is a requisite. In that case, if there was a joint enterprise at all, its ends were undeniably criminal and the issue simply did not arise.

criminal conspirators, and, thus, the alleged joint undertaking must have a criminal purpose. The Federal Rules of Evidence do not relax out of expediency other evidentiary standards, merely upon a finding by the court by a preponderance of the evidence that the party or parties against whom the evidence is offered are criminal conspirators. The more sound view, and the one the court adopts, is the one adopted in *Layton* and endorsed by respected commentators Louisell and Mueller:

> Modern authority indicates that the essence of the coconspirator exception is a "combination" among the coventurers, hence that the proponent of a coconspirator statement need not establish by independent evidence that the conspiracy is unlawful. This holding goes far to assure that the coconspirator exception is indeed more properly understood as a "joint venture" exception whose essence is an agreement among the members to pursue some common plan.

4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 125 (Supp. 1987); *cf. United States v. Bucaro*, 801 F.2d 1230, 1232 (10th Cir. 1986) ("The rule embodies a long-standing doctrine, applicable in both civil and criminal cases, founded on general principles of agency and partnership law."). Because the court found there was such an agreement to pursue a common plan, the evidence in question was properly admitted.

F. Prosecutorial Misconduct

The defendants, and in particular Mr. Anderson, seek a new trial by positing what might be termed a virtual

grab bag of arguments falling under the general category of prosecutorial misconduct. As set forth below, the court has carefully considered each of these arguments and found them to be without merit.

1. Preindictment Delay

Claims for preindictment delay receive limited protection under the Due Process Clause of the Fifth Amendment. *United States v. Johnson*, 120 F.3d 1107, 1110 (10th Cir. 1997). "Preindictment delay is not a violation of the Due Process Clause unless the defendant shows both that the delay caused actual prejudice and that the government delayed purposefully to gain a tactical advantage." *Id.* (citations omitted). Investigative delay, as opposed to purposeful delay to gain an advantage, is not proper grist for a due process claim. *United States v. Lovasco*, 431 U.S. 783, 795 (1977).

The defendants raised this motion in their pretrial papers, as well. At that time, the court explained:

> The defendants allegations might, if true, make out a case of preindictment delay. The defendants specifically identify a number of individuals who would have testified on their behalf who have died since the government's investigation began and the specific testimony that would have been offered. The defendants also allege facts which might, at some point, allow the court to infer that the government's delay was purposefully designed to gain a tactical advantage, including the government's alleged successful attempts to get Health Midwest to fire some of the defendants and cease paying for their legal expenses.

United States v. Anderson, No. 98-20030-01/-07-JWL, 1999 WL 84290, at *13 (D. Kan. Jan. 8, 1999).

All of the defendants' pretrial allegations fell flat at trial, and their renewed motion falls flat now. The defendants simply did not suffer any actual prejudice from the government's delay in bringing this case, nor did anything occur at trial which led the court to believe the delay was caused by anything other than logistical investigatory reasons.[28] The defendants' arguments concerning the deaths of various witnesses carry little weight because the evidence these witnesses would have offered would have been cumulative. *See United States v. Comosona*, 848 F.2d 1110, 1114 (10th Cir. 1988) (defendant did not show prejudice because of unavailable witnesses where the witnesses' testimony would have been cumulative). Moreover, the merit of the defendants' motion is highly suspect because, as the government points out, two of the now-dead witnesses on whom the defendants seek to rely died long before the government's investigation at Baptist even began. The defendants' arguments concerning government efforts to get the hospital executives fired or to get Health Midwest to stop paying their legal bills have no merit because the jury never learned that Mr. Anderson had been fired or that Mr. McClatchey had been placed on administrative leave and the defendants do not allege that Health Midwest actually stopped paying either executive's legal bills.

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[28] Because the allegations do not make out a case of actual prejudice, the court denies the defendants' motions for a hearing on this issue.

2. Judicial Immunity

The defendants ask the court to grant a new trial to allow it to grant judicial immunity to certain defense witnesses. The defendants claim that the prosecutor's broad approach to identifying potential coconspirators for purposes of Fed. R. Evid. 801(d)(2)(E) eviscerated their ability to put on a defense because many of the people identified refused to testify on Fifth Amendment self-incrimination grounds. According to the defendants, this was a purposeful tactic by the prosecution to preclude them from putting on helpful witnesses.

The court rejects the defendants' arguments for the same reasons it rejected them before and during trial. The court denied the defendants' request to provide judicial immunity to selected witnesses because Tenth Circuit law indicates that "courts have no power to independently fashion witness use immunity under the guise of due process. . . . [T]he power to apply for immunity . . . is the sole prerogative of the [executive branch of] government." *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982). Despite the defendants' arguments, there is no indication that the government engaged in a "deliberate attempt to distort the fact finding process." *See id.* (reserving ruling on whether judicial immunity was appropriate in such highly offensive situations).[29]

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[29] As an alternative form of relief, the court granted the defendants an opportunity under the residual exception to the hearsay rule, *see* Fed. R. Evid. 807 (hearsay not subject to any exception may be admitted if, among other requirements, it has equivalent circumstantial guarantees of trustworthiness), to call the attorneys of some of these witnesses to testify concerning

3. Other Alleged Misconduct

The defendants seek a new trial because of claimed government outrageous conduct, both before trial and during trial, in the form of intimidation of witnesses and improper remarks to the jury. The court denies the motion because despite instances of prosecutorial excess, the misconduct did not reach the level of a due process violation.

The touchstone of due process analysis in cases of alleged prosecutorial misconduct is "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 220 (1982). To justify a new trial, "[t]he relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *United States v. Chapman*, 615 F.2d 1294, 1301 (10th Cir. 1980) ("Every slight excess of the prosecution does not require that a verdict be overturned and a new trial ordered.").

The court has reviewed all the alleged misconduct and concludes that most of it was not misconduct at all. For example, of the countless alleged improper remarks in the government's closing, only two were actually

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what the witnesses told FBI agents in government interviews. *See* Tr. at 9321 ("[I]n place of the oath which we frequently look to as a guarantee of reliability, we have 18 U.S.C. § 1001 (crime to make false statements to FBI), which in many respects has more teeth perhaps even than the oath."). The defendants declined the court's offer.

improper.[30] The first improper remark was when the government chided the defense for objecting too often under the rules of evidence. *See* Tr. at 9710-12. The court sustained the defendants' objection to this remark, so it caused little, if any, prejudice. The second improper remark was when the government implied the attorney defendants were guilty criminals. *See* Tr. at 9762. This remark may have caused Mr. McClatchey some prejudice, *see supra* part III.B, but it caused no prejudice to Mr. Anderson and the Drs. LaHue. The remainder of the alleged improper remarks at closing were merely proper invitations to the jury to draw inferences in the government's favor and do not represent prosecutorial misconduct. The court has also reviewed various prosecutorial indiscretions such as informing Mr. McGrath that the grand jury thought he was a "lying sack of shit" and threatening Mr. Probst to the effect that an attempt to shade his testimony in the defendants' favor would be met with the prosecutor figuratively shoving the documents "up your ass." In the final analysis, the court believes these remarks, although improper and certainly unbecoming for an Assistant United States Attorney, do not rise to the level of a due process violation. *See Chapman*, 615 F.2d at 1301 (slight excess of prosecution is not sufficient to entitle defendants to new trial). Neither of the witnesses appeared to have been intimidated in connection with their testimony and the jury was made

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[30] The defendants objected to only three comments during the government's closing argument. Only one of the objections was sustained.

aware of the prosecutor's comments for their consideration in evaluating that testimony.

IV. Arrest of Judgment

The defendants move for an arrest of judgment, arguing that the indictment does not state an offense. Pursuant to Fed. R. Crim. P. 34, arrest of judgment is appropriate "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." A motion under the rule is limited to the record, including the indictment and verdict, but excluding the evidence at trial. *United States v. Sisson*, 399 U.S. 267, 281-82 (1970).

Defendants' motion for arrest of judgment does not set forth any new arguments. Instead, it "incorporates . . . by . . . reference the legal arguments set forth in . . . prior motions, made prior to trial." In like fashion, the court denies the motion by referencing its carefully articulated pretrial rulings. *See United States v. Anderson*, No. 98-20030-01/-07-JWL, 1999 WL 79654 (D. Kan. Jan. 19, 1999) (denying motion to dismiss indictment for duplicity, and denying motion to dismiss for failure to state an offense).[31]

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[31] The court does not readdress the defendants' vagueness as applied arguments because a motion under Rule 34 limits the court's consideration to only the indictment and verdict. *See Sisson*, 399 U.S. at 281-82.

V. Production of Sentencing Memo

Although the defendants do not present the court with any authority directly on point, they make a persuasive argument that because the United States Probation Office ("USPO") is treated as an arm of the court, any communications by the government made to an officer of the USPO in connection with the preparation of a presentence investigation report ("PSIR") should be treated like communications to the court itself. In other words, if such communication is to be had, it should not be ex parte, but should be shared with the defendants.[32] The government argues in return that traditionally communications by both prosecution and defense are had with the USPO in this run-up to the preparation of a PSIR without any requirement to furnish copies of memos to the other side or to include representatives of adversaries in face to face meetings. This process has proven helpful to the USPO officers in discharging their responsibility to the court. The government also notes that if the logic of the defendants' argument is to be accepted it would, of course, be equally applicable to defendants who also routinely provide input for the preparation of the PSIR.

While the defendants' argument is facially appealing, the court is not persuaded that a blanket prohibition against ex parte contact with officers of the USPO is required by law. The role of the USPO is different from, say, that of the judge's law clerk to whom it would be

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[32] *See, e.g., United States v. Alverson*, 666 F.2d 341, 349 (9th Cir. 1982) ("[I]t is improper for the prosecution to make, or for the court to receive from the prosecution, an ex parte communication bearing on the sentence.").

improper to make an ex parte communication. The USPO receives narratives, suggestions, and even argument from both sides to assist it in preparation of the PSIR. Unlike a law clerk, whose advice to the judge is strictly confidential, however, the USPO officers assemble information and promulgate the PSIR for both informal and formal comment by both sides. The office furnishes this report with an addendum that sets out the reactions and objections of the parties, if any, to the proposed findings and recommendations. Crucially, then, ex parte conduct with the USPO officer has been a traditional and useful part of the investigative process but one which has as a check against impropriety the divulging of the PSIR to the parties with a mandated opportunity for them to present whatever contrasting views they may have to the court through objections, briefs and oral argument.

All that having been said, however, the court does believe that under certain circumstances there is the potential for unfair prejudice to a party as the process has worked. Judges may well accord certain tacit deference to the findings and recommendations of the USPO officers who regularly assist them in the often complex and sometimes befuddling regimen of sentencing under the United States Sentencing Guidelines ("USSG"). Thus, perceptions of the case, leading to proposed findings and recommendations of a USPO officer, if sufficiently influenced by effective advocacy during the process of preparation of the PSIR, might be difficult to overcome – both on the part of the USPO officer during the objection and consultation phase after the initial draft of the PSIR has been furnished to counsel and by the side who must argue to

the judge why a contrary view should be adopted at the sentencing hearing.

In order to resolve this problem, the court believes that it is appropriate to make some differentiation based upon the nature of the contact or submission of papers to the USPO. Routine provision of neutrally presented background facts concerning the parties' respective views of the offense conduct, for example, need not be subject to a stifling requirement of access for the opposing party. When a submission, particularly in writing, becomes blatantly an exercise in advocacy, however, fairness dictates that it be shared with the other side so that the danger of undue influence at the formative stages of this process can be tempered through adversarial scrutiny.[33] Advocacy, as contrasted with the even handed furnishing of information, occurs when, for example, specific recommendations are made about the selection of which guideline to apply (for that is sometimes a crucial threshold decision), what upward or downward adjustments should be made, or how the guidelines should be applied in light of the offense conduct or what might arguably be relevant conduct under the USSG. Advocacy also occurs when case law is presented to the USPO on a point or where argument is made in the submission in an attempt to persuade the USPO on a point. When a party has reasonable suspicion that an opposing party has engaged in advocacy in its ex parte dealings with the USPO,

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[33] *See* D. Conn. R. 10 ("The attorney for the government may submit a 'Government's Version of the Offense' to the Probation Officer and, in that event, shall serve a copy on counsel for the defendant.").

fairness dictates that the party have the opportunity to call this matter to the court's attention and at least ask for an in camera review by the judge to determine whether or not it would be appropriate to compel the side furnishing the alleged advocacy-oriented communication to the opposing side to alleviate the risk of attitudes being hardened at an early stage by a one sided flow of information.

The court has reviewed the government's submission here. It is an advocacy document. The government shall furnish copies of it to counsel for each of the defendants within five calendar days of the date the memorandum and order is filed. In the event the defendants wish to supplement their written submissions to the USPO in light of this document, they may do so within ten calendar days thereafter, with copies to counsel for the government.

IT IS THEREFORE ORDERED BY THE COURT that Dennis McClatchey's motion for acquittal or new trial (Doc. 428) is granted. The clerk will enter judgment of acquittal on all counts. Pursuant to Fed. R. Crim. P. 29(d), Mr. McClatchey is conditionally granted a new trial in the event the judgment of acquittal is hereafter vacated or reversed.

IT IS FURTHER ORDERED that Ronald LaHue's motion for acquittal (Doc. 426) is granted in part and denied in part. The clerk will enter judgment of acquittal on count eight. The motion is denied as to all other counts.

IT IS FURTHER ORDERED that the defendants' motion to compel production of the government sentencing memo (Doc. 420) is granted. The government shall furnish copies of it to counsel for each of the defendants within five calendar days of the date the memorandum and order is filed. In the event the defendants wish to supplement their written submissions to the USPO in light of this document, they may do so within ten calendar days thereafter, with copies to counsel for the government.

IT IS FURTHER ORDERED that Robert LaHue's motion for acquittal or new trial (Doc. 427), Dan Anderson's motion for acquittal, new trial, or arrest of judgment (Doc. 432), Ronald LaHue's motion for new trial (Doc. 425), and all defendants' motion to dismiss based on preindictment delay (Doc. 423) are denied.

IT IS SO ORDERED.

Dated this 21st day of July, 1999 at Kansas City, Kansas.

/s/ John W. Lungstrum
John W. Lungstrum
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	Case Nos.
	)	99-MC-205-JWL
Plaintiff,	)	99-MC-207-JWL
	)	
v.	)	
	)	
DAN ANDERSON, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed May 7, 1999)

This matter comes before the court on a dispute collateral to the complex prosecution of two doctors, three hospital executives, and two lawyers in an alleged Medicare Kickback scheme. After a nine-week jury trial, the jury convicted the two doctors and two of the hospital executives on conspiracy and other charges.[1]

The dispute now before the court stems from the government's act of naming three other lawyers as "unindicted coconspirators" in various pretrial papers and at trial. Attorney Gina Kaiser, who testified for the government at trial, seeks (1) an order expunging all references to her as an unindicted coconspirator in the Government's Memorandum In Support of Its Motion for Determination of Conflict (Doc. 96), (2) a finding that she was

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[1] The jury acquitted one of the hospital executives. The court acquitted the two lawyer defendants at the close of the government's case. *See United States v. Anderson*, 98-20030-JWL, Tr. at 7336-7352, (D. Kan. Mar. 9, 1999).

denied her due process rights, and (3) a finding that the government's evidence in this matter proved only that she acted in good faith and not that she was a member of an illegal kickback conspiracy. Attorneys S. Craig Holden and David Queen jointly seek (1) an order expunging from the record all references to them as "coconspirators" or "unindicted coconspirators," and (2) a finding that the proof at trial did not support the government's allegation that they participated in an unlawful conspiracy, but showed instead that they acted appropriately and legally. For the reasons set forth below, the petitioners motions are granted in part and denied in part.

I. Background

Proper framing of the issues here involved requires a brief procedural history recitation. On June 11, 1997, a federal grand jury indicted Drs. Robert and Ronald LaHue on charges of conspiracy and program fraud pursuant to 18 U.S.C. §§ 371, 666. The indictment alleged that the LaHues had conspired with unnamed coconspirators, both known and unknown to the grand jury. On March 18, 1998, this court dismissed the section 666-related charges on jurisdictional grounds, *see United States v. LaHue*, 998 F. Supp. 1182 (D. Kan. 1998), *aff'd*, 170 F.3d 1026 (10th Cir. 1999), but not before the LaHues had sought and obtained, under seal, a list of individuals whom the government considered unindicted coconspirators. While pursuing its appeal in the LaHue case, the government obtained an indictment against Dan Anderson, Dennis McClatchey, Ronald Keel, Ruth Lehr, Mark

Thompson, and the Drs. LaHue on conspiracy and Medicare kickback charges pursuant to 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b).[2] *See, e.g., United States v. Anderson*, No. 98-20030-JWL, 1999 WL 84290 (D. Kan. Jan. 8, 1999). The new indictment, like the dismissed indictment, alleged the existence of unnamed, unindicted coconspirators.

While preparing for trial on the new indictment, the government sought disqualification of trial counsel for Dr. Ronald LaHue and Dr. Robert LaHue because it perceived an unsworn witness problem stemming from the appearance of trial counsel's names on some of the documents it intended to use at trial. The government also asked the court to discern whether any potential conflict arose out of any joint defense agreements or third party fee arrangements. *See United States v. Anderson*, 98-20030-JWL, 1998 WL 713934 (D. Kan. Sept. 28, 1998) (explaining court's findings concerning potential conflicts after individual colloquies with each defendant). In its memorandum in support of this motion, the government, for the first time, publicly identified movants Gina Kaiser, S. Craig Holden, and David Queen as unindicted coconspirators. The government's identification of the movants as coconspirators was notoriously reported in the legal and healthcare community. *See* J. Duncan Moore, Jr., *Baptist Probe Escalates: Unindicted Co-conspirators Named in Kickback Case*, Modern Healthcare, Sept. 7, 1998, at 8; Kip

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[2] Although it contained additional defendants and was presented under an alternative statutory theory, the new indictment alleged conduct substantially identical to the conduct alleged in the dismissed indictment.

Betz, *Trial Dates Set in LaHue Kickback Case; Motion Names Unindicted Co-Conspirators*, BNA's Health Care Fraud Report, Sept. 23, 1998, at 713; *Healthcare Compliance Gets More Complicated – & More Risky: U.S. Indicts Attorneys in Hospital, Physician Kickback Case*, Washington Insider's Focus, October 9, 1998, at 1; Peter Aronson, *Health Care Fraud Rasies Ire: Three Lawyers Identified as Unindicted Co-Conspirators*, National Law Journal, Nov. 23, 1998, at A01; Janet Novack, *First, Indict All the Lawyers*, Forbes, Jan. 25, 1999, at 62. The government's memorandum did not explain why the government felt compelled to identify the movants publicly as coconspirators. Later, on November 25, 1998 and at the defendants' request, the court ordered the government to provide all defendants with a complete list of unindicted conspirators under seal.[3]

II. Analysis

A. Legal Framework

There are no Tenth Circuit cases discussing the propriety of naming unindicted coconspirators. A number of courts, however, have followed the Fifth Circuit's lead in *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975) (striking named unindicted coconspirators from an indictment) and *In re Smith*, 656 F.2d 1101 (5th Cir. 1981) (issuing a writ of mandamus that required district court to seal and strike the name of an unindicted coconspirator from a

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[3] The government's previous disclosure of unindicted coconspirators to the Drs. LaHue had not yet been shared with the new defendants because the new defendants were not yet subject to the court's protective order.

Rule 11 plea colloquy and related papers). *See* 1 Charles Alan Wright, *Federal Practice and Procedure 3d* § 110, at 464 n.15 (1999). *Briggs* was a proceeding collateral to the high-profile prosecution of certain political demonstrators at the 1972 Republican National Convention in Miami, Florida. *Briggs*, 514 F.2d at 796-97. The indictment in *Briggs* named ten coconspirators, seven of whom were indicted and three of whom were not.[4] *Id.* at 797. Two of the unindicted coconspirators sought an order expunging their names from the indictment. *Id.* The trial court denied the motion without comment. *Id.*

On appeal, the Fifth Circuit first determined that the unindicted conspirators' motion was justiciable. *Id.* Standing was appropriate, held the court, because the movants had alleged a concrete injury to their reputations and economic interests from the grand jury's action. *Id.* at 797-98. The court rejected the government's three theories related to standing: (1) that a person's interests are not adversely affected by being publicly branded a felon, (2) that the only injury the movants suffered came at the hands of the news media, and (3) that the acquittal of their alleged coconspirators was sufficient to remedy any injury they incurred. *Id.* at 799. The issues were not moot because the injury to the movants was "real, direct, and continuing." *Id.* at 800.

Moving to the merits of the case, the Fifth Circuit held it was beyond the power of a grand jury to name unindicted coconspirators:

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[4] All of the indicted defendants were eventually acquitted by a jury. *Id.* at 797.

> The grand jury that returns an indictment naming a person as an unindicted conspirator does not perform its shielding function but does exactly the reverse. If the charges are baseless, the named person should not be subjected to public branding, and if supported by probable case he should not be denied a forum.

Id. at 803. Naming an unindicted coconspirator in an indictment offends due process because, when weighing the governmental interest in naming an unindicted coconspirator against the harm to the individual who is accused but not indicted, "the balance tips wholly in favor of the adversely affected appellants." *Id.* at 806.

In *Smith,* the Fifth Circuit extended the *Briggs* rule well beyond the grand jury context, and ordered other court filings and records naming an unindicted coconspirator sealed and struck. *Smith,* 656 F.2d at 1107. *Smith* arose out of bribery allegations concerning the Army and Air Force Exchange Service (AAFES). *Id.* at 1102. The AAFES purchases billions of dollars of merchandise each year for resale to military personnel through the military P.X. system. *Id.* The principal defendants in *Smith* pleaded guilty to a felony information charging one count of bribery of an AAFES purchasing agent. *Id.* at 1103. During the plea hearing, the Assistant United States Attorney read in open court and filed in the case record a factual resume prepared for purposes of the plea hearing. *Id.* "In addition to describing the events immediately involved in [the] plea of guilty, the resume went on to state that [the defendant] had paid sums to other unnamed AAFES employees, but also specifically named the head of AAFES, [Mr. Edward S. Smith,] among those other

employees." *Id.* The news media picked up on this information, and reported that, "as a matter of official courtroom record, Mr. Smith had been paid bribe monies by various businesses dealing with AAFES." *Id.* at 1104. Mr. Smith sought relief in the district court, which was denied. *Id.* at 1105. He sought mandamus in the Fifth Circuit. *Id.* Simultaneously, the Commander of AAFES notified Mr. Smith that his retirement benefits would be reduced because of the accusations of wrongdoing. *Id.*

The Fifth Circuit granted mandamus, holding that the plea transcripts and documents must be sealed and stricken, and that they could not be used against Mr. Smith in any administrative benefits proceeding:

> The government in this case urges us to accept the procedures followed regarding the factual resumes to be consistent with *Briggs*. The government argues that *Briggs* only forbids the naming of unindicted coconspirators by a federal grand jury. We cannot agree. The point made in the *Briggs* decision is that no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights. We can think of no reason to distinguish between an official defamation originating from a federal grand jury or an Assistant United States Attorney.
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> . . .
>
> The presumption of innocence, to which every criminal defendant is entitled, was forgotten by the Assistant United States Attorney. . . .

Id. at 1106-07.

What *Briggs* and *Smith* teach, then, is that motions like the one here before the court can be justiciable in a proper situation. These cases also teach that, when a motion like this is justiciable, the court must undertake a due process balancing inquiry, balancing the interests of the government in naming unindicted coconspirators against the individual harm that stems from being accused without having a forum in which to obtain vindication.

B. Justiciability

The court concludes that the motions here are justiciable; the movants have standing and their claims are not moot. "[I]n order to establish Article III standing, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 772 (1999) (citing *Allen v. Wright*, 468 U.S. 737 (1984)). Although the movants here do not allege injury of the same magnitude and concreteness as Mr. Smith's lost retirement benefits in *Smith*, they surely suffered injury at least equally as concrete and weighty as the petitioners in *Briggs*. Here, like in *Briggs*, there were numerous press reports affecting the movants' good names and reputations. It is undisputed that the movants here are widely known and highly respected health care lawyers, and the government has not tried to refute their claim that being labeled as criminal coconspirators injured their reputations. Moreover, the relief the movants request would likely redress the injury they continue to suffer. Were the

court to expunge all references to the movants as "coconspirators" from the public record, make a finding that their due process rights had been violated, and further find that the government's proof fell far short of proving their criminal culpability, the movants could forevermore proclaim their vindication to anyone expressing concern about the government's allegations. *Cf. Cache Valley Elec. Co. v. Utah Dep't of Transp.*, 149 F.3d 1119, 1124 (10th Cir. 1998) (non-minority electrical contractor would have standing to challenge presumption that minority businesses should receive favorable treatment if it could show that elimination of the presumption would "likely" redress its injury by improving the terms of competition it faced). Nor are the movants' claims moot; they have a very real, personal, and ongoing stake in the outcome here. *See Briggs*, 514 F.2d at 800 n.8 (quoting *Application of Turner and Newall, Ltd.*, 321 F. Supp. 728 (E.D. Pa. 1964) ("This case involves the imputation of illegality . . . to the applicant in a document of record, which is not a moot question as far as the applicant is concerned.")).

C. Due Process

The court believes the movants suffered a violation of due process when the government publicly named them in its moving papers on the conflict of interest issue. Following the lead of *Briggs* and *Smith*, the court weighs the governmental interest in naming the unindicted coconspirators against the individual harm that stems from being accused without having a forum in which to obtain vindication. *See Briggs*, 514 F.2d at 804; *Smith*, 656

F.2d at 1106-07. After carefully reviewing the government's moving papers on the conflict of interest issue, the court can find no reason why the government might have "forgotten" the presumption of innocence in such a public pleading, *see Smith*, 656 F.2d at 1107, which would "rise to the dignity of a substantial interest."[5] *Briggs*, 514 F.2d at 804. The very real stigmatization suffered by the movants from this government action far outweighs the nonexistent government interest in publicly naming them as coconspirators. *See Smith*, 656 F.2d at 1107.[6]

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[5] The government now claims that its identification of unindicted coconspirators was part of an effort to illustrate the admissibility of evidence it intended to offer at trial through which a conflict could arise. *See, e.g.*, Fed. R. Evid. 801(d)(2)(E) (coconspirator hearsay exclusion). Be that as it may, the government provides no explanation for why its moving papers were not submitted under seal. *See Briggs*, 514 F.2d at 805 (public identification of unindicted coconspirators "may be tempered by protective orders. . . . ").

[6] The government argues that the fact Ms. Kaiser entered into a letter immunity agreement and agreed to testify in the government's case in chief allowed the government publicly to identify her as a coconspirator. *See Briggs*, 514 F.2d at 804 n.16; *Application of Jordan*, 439 F. Supp. 199, 206 n.7a (D. W. Va. 1977). This argument misses the mark because Ms. Kaiser did not agree, as some who testify for the government in criminal trials do, to testify about her own criminal conduct or otherwise admit guilt. To the contrary, Ms. Kaiser did not say anything on the stand that would implicate her in any criminal activity. Surely the government does not mean to imply that an individual who initially invokes her Fifth Amendment right not to speak to the government waives the presumption of innocence by later agreeing merely to accept immunity and testify about her non-criminal acts.

The injuries suffered, at least by Ms. Kaiser and Mr. Holden, were in one sense inevitable because the government had a substantial interest in identifying them at trial as coconspirators. *See Briggs*, 514 F.2d at 805 ("it must be recognized in the process of balancing private injury and governmental interests that wholly different, and valid, governmental interests apply to naming the private citizen . . . in trial testimony. . . . "). The government identified at least Ms. Kaiser and Mr. Holden, and perhaps Mr. Queen,[7] as coconspirators at trial, arguing that documents containing their statements under Fed. R. Evid. 801(d)(2)(E) (coconspirator exclusion from the hearsay rule) should be admissible.[8] The government clearly had a substantial interest in identifying these coconspirators for 801(d)(2)(E) purposes. The governmental interest outweighed the movants' private injuries because their private injuries, while important, must yield to the proper administration of criminal justice under these circumstances. *Cf. United States v. Durland*, 575 F.2d 1306,

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[7] The court does not recall the government having identified Mr. Queen as an unindicted coconspirator at trial, but the court's memory may be foggy on this point. The court does not yet have access to a complete official transcript, and so is unable to confirm its recollection. In any event, because the question makes no difference to the outcome of these motions, the court assumes that the government did identify Mr. Queen as a coconspirator at trial.

[8] In many situations, the government's 801(d)(2)(E) proffer was a fallback position in case its 803(6) (business records) arguments were unpersuasive. That the government's position was a fallback position, however, in no way detracts from the legitimacy of its interest in labeling the movants as coconspirators.

1310 (10th Cir. 1978) (conspiracy charge not a prerequisite to admissibility of declarant's statements under 801(d)(2)(E)). Accordingly, no due process violation resulted from the government's identification of the movants at trial as coconspirators.

The mere fact that the government eventually needed legitimately to let the cat out of the bag at trial, however, does not alter the court's conclusion that the movants' pretrial public identification was a violation of due process because there is an important distinction between being unqualifiedly identified in a pretrial document as an "unindicted coconspirator" and being identified as a coconspirator at trial for purposes of 801(d)(2)(E). Pursuant to the court's rulings, an 801(d)(2)(E) coconspirator is not necessarily a criminal. All that is required is that he or she be a "joint venturer" in a common plan. *See United States v. Layton,* 855 F.2d 1388, 1399 (9th Cir. 1988); *United States v. Saimiento-Rozo,* 676 F.2d 146 (5th Cir. 1982); *United States v. Regilio,* 669 F.2d 1169 (7th Cir. 1981). In fact, at the government's request, the court found at trial that Ms. Kaiser and Mr. Holden[9] were "coconspirators" for purposes of Rule 801(d)(2)(E) in the sense that they were

> participants of a common plan to put together and facilitate and operate and carry out the relationship between Baptist Medical Center

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[9] The court was not asked to make findings at trial concerning Mr. Queen but would have made no more inculpatory findings as to him.

> and Blue Valley Medical Group for the continuum of care. They participated in a joint venture, if you will, for the purposes of 801(d)(2)(E). And whether there was a criminal intent on the part of any or all of those individuals is something which . . . I need not reach. . . .

Tr. 9624-26.[10] Thus, the government's identification of the movants as 801(d)(2)(E) coconspirators at trial does not allow for the reasonable inference that they are criminals. In contrast to the trial identification, however, the government's unqualified identification of the movants as unindicted coconspirators in its pretrial moving papers allows for the reasonable inference that they have been labeled criminals. The movants suffered a due process violation.

D. Remedy

It remains for the court to construct a remedy. The requests for relief include: (1) an order expunging all references to Ms. Kaiser as an unindicted coconspirator in the Government's Memorandum In Support of Its Motion for Determination of Conflict, (2) a finding that Ms. Kaiser was denied her due process rights, (3) an order expunging from the record all references to Mr. Holden and Mr. Queen as coconspirators or unindicted coconspirators, and (4) a finding that the government's evidence in this matter proved only that the three movants acted in good faith and not that they were members of an illegal

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[10] The court most assuredly did not make a finding that any of the movants were members of a criminal conspiracy.

kickback conspiracy. The court grants the first request as to all movants. The court grants the second request in part as to all movants. The court denies the third and fourth requests as to all movants.

All three movants were denied their due process rights in connection with the government's Motion for Determination of Conflict. Accordingly, the court orders the Clerk of the United States District Court for the District of Kansas to seal the Government's Memorandum In Support of Its Motion for Determination of Conflict (Doc. 96) in case No. 98-20030-JWL until such time as this order becomes final. When this order becomes final, the clerk shall unseal the document and "completely and permanently strike," *see Smith*, 656 F.2d at 1107, all references to Ms. Kaiser, Mr. Holden, and Mr. Queen.[11]

The three movants did not suffer a due process deprivation in connection with the government's identification of them as coconspirators for 801(d)(2)(E) purposes at trial. Accordingly, the court denies Mr. Holden's and Mr. Queen's request to strike all references to them from the case record.

The court also denies the movants' requests to make factual findings related to their innocence. The underlying trial focused on the guilt or innocence of the named defendants and simply was not focused on the movants' guilt or innocence of any crime. Certainly, however, there

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[11] Although Mr. Holden and Mr. Queen did not specifically request this relief, the court grants it because it is firmly convinced it would appropriately remedy the violation of their due process rights.

was no evidence that led this court to believe they were involved in criminal activity. Moreover, the court reiterates some of the findings it made at trial which relate directly to the named lawyer defendants and which bear significantly on the court's views concerning these movants:

> The court is firmly convinced from the evidence presented that the only reasonable inference a jury could draw is that the lawyers, each in their own turn, attempted to advise their clients to engage in legal transactions and that these two Defendants [lawyers Ruth Lehr and Mark Thompson] did not prepare sham agreements to paper over a fraud but, rather, tried their best to prepare agreements that would reflect what they intended to be legal transactions into which their clients desired to enter. The state of the law was in flux; the lawyers adapted their advice to it as it changed.
>
> The government, in effect, argues that the relationship between Baptist and Blue Valley Medical Group was so tainted by an overarching desire on the part of the Baptist defendants to receive referrals and on the part of the Drs. LaHue to receive payments for those referrals that illegal remuneration to induce [referrals] was virtually inescapable. The court disagrees. It is undisputed from the evidence that *all* the lawyers who dealt with or reviewed these transactions . . . held good faith beliefs that it was *possible* to facilitate some business relationship that was legal between the hospitals and the Blue Valley Medical Group. Even if patient referrals were devoutly hoped for and anticipated; even if the volume of patients could be large; even if the parties might never have come

together but for Baptist having embarked on a long range plan that depended on attracting nursing home patients, there is nothing in the evidence or the law that would have a priori precluded a legal relationship from being entered into under these circumstances.

The problem here is that a very simple concept, "payment for patients is illegal," became far from simple as Congress, the Executive Branch, and the Courts got more deeply involved. "Remuneration to induce" language invites judicial interpretation as to what these words mean. Indeed, the government in this case adamantly maintains that the words require definition as part of jury instructions. Judicial catch phrases like "one purpose rule" or "primary purpose rule," the reversals of field by the Office of Inspector General, the checkered history of the *Hanlester* case and the reservation by Congress of a safe harbor provision in the Act, the promulgation of regulations concerning which were delayed for a considerable time, all invite lawyers to attempt to devise legal ways for parties to have a relationship which has as a component hoped-for and anticipated referrals. That's what defendants Lehr and Thompson did under the evidence presented in this case.

There were no decisions from the U.S. Supreme Court or from the Eighth or Tenth Circuits, where the activities in question were going on, to guide them. What the evidence unassailably demonstrated is that they steadfastly maintained to their clients that if fair market value was paid for the doctors' practice or

> for legitimate consulting services, the relationship passed legal scrutiny. Nothing in the evidence or the law suggests otherwise.

Tr. 7342-45 (emphasis added); *see also* Tr. 2465 ("THE COURT: I'm skeptical. If there's nothing more to tie Mr. Holden to the documents, given what I think the tenor of the documents frankly are that I have seen that Mr. Holden authored, that I'm going to be persuaded that he was involved in a [criminal] conspiracy."); Tr. 4238 ("THE COURT: As I recall, your position was you weren't going to attempt to prove that Mr. Holden was a co-conspirator. MS. TREADWAY: No. Because he's an agent at this point in time."); Tr. 9320-21 ("THE COURT: I've also noted and without being – not intending to be pejorative about it, but the Government has deliberately identified people as coconspirators in this case. Some of the people who testified in this case, who it turns out were identified as coconspirators, frankly, I would certainly be curious to know the rest of the evidence the Government had concerning them that would have caused them to believe these people were involved in criminal activity as opposed to simply folks involved in a business activities [sic], which may or may not in fact have been criminal, but without any knowledge on the part of those individuals. Certainly, a particularized example is the status of Gina Kaiser who came into this as an unindicted coconspirator and Ms. Treadway now seems to be using her as the Government's chief example what an attorney should do by suggesting such things as the contract should have been discontinued."). These transcript excerpts reflect the court's views concerning the evidence at trial better than any post hoc findings ever could. Publication of them

here, it is hoped, will help remedy the wrong done by the government to these lawyers by its unnecessary branding of them in its public pretrial papers.[12]

IT IS THEREFORE ORDERED BY THE COURT that Ms. Kaiser's Motion to Expunge (Doc. 1, 99-MC-207-JWL), and Mr. Holden's and Mr. Queens' Motion to Expunge (Doc. 2, 99-MC-205-JWL) are granted in part and denied in part. The District Clerk for the District of Kansas shall seal the Government's Memorandum In Support of Its Motion for Determination of Conflict (Doc. 96) in case No. 98-20030-JWL until such time as this order becomes final. When this order becomes final, the Clerk shall completely and permanently strike all references to Ms. Kaiser, Mr. Holden, and Mr. Queen in the Government's Memorandum In Support of Its Motion for Determination of Conflict (Doc. 96) in case No. 98-20030-JWL.

IT IS FURTHER ORDERED that this Memorandum and Order shall remain under seal pursuant to the court's April 2, 1999 order (Doc. 1, 99-MC-205-JWL) until such time as one or more parties obtain the court's leave to have it unsealed.

IT IS SO ORDERED.

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[12] As of the date of this Memorandum and Order, all proceedings related to the pending motions, including this Memorandum and Order, remain under seal. Accordingly, this Memorandum and Order shall remain under seal until such time as one or more of the parties seek and obtain the court's leave to have all or part of the proceedings unsealed.

Dated this 7th day of May, 1999 at Kansas City, Kansas.

/s/ John W. Lungstrum
John W. Lungstrum
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellant, v. DENNIS McCLATCHEY, Defendant - Appellee.	)	No. 99-3274

ORDER
Filed August 2, 2000

Before BALDOCK, McWILLIAMS,
and MURPHY, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. The petition for rehearing en banc is denied. A poll was requested, and Chief Judge Seymour, and Judges Tacha, Kelly, and Henry voted to grant en banc consideration.

Entered for the Court

PATRICK FISHER, Clerk of Court
by: /s/ [Illegible]
Deputy Clerk

(2)

No. 00-690

Supreme Court, U.S.
FILED
NOV 20 2000
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS L. MCCLATCHEY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF FLORIDA ACADEMY OF HEALTH CARE ATTORNEYS, GREATER KANSAS CITY SOCIETY OF HEALTH CARE ATTORNEYS, HEALTH CARE LAW SECTION OF THE STATE BAR OF MICHIGAN, KANSAS ASSOCIATION OF HOSPITAL ATTORNEYS AND OKLAHOMA HEALTH LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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24pp

QUESTION PRESENTED

Whether the court of appeals erred in adopting the "one purpose" test under the Medicare Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), by which a jury may convict a health care provider of a federal felony if any part of a health care business relationship contemplates possible patient referrals.

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This *amicus curiae* brief is submitted in support of Petitioner, Dennis McClatchey. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

INTEREST OF AMICI CURIAE

The Florida Academy of Health Care Attorneys ("FAHA") consists of 150-plus members who are attorneys practicing in the health care field. Individual members represent hospitals and healthcare systems in Florida, as well as physicians' practices, nursing homes, managed care companies and other healthcare related businesses throughout the state. FAHA is a membership group of the Florida Hospital Association, a non-profit organization formed to further and improve hospitals and healthcare in the state. FAHA provides its members with opportunities for education, discussion, professional interaction and consultation. It also advocates for the interests of its members when practice issues affecting the healthcare industry are at stake.

The Greater Kansas City Society of Healthcare Attorneys ("GKCSHA") consists of 96 members – all healthcare attorneys. Collectively, the membership represents at least 200 hospitals, as well as physicians' practices, nursing homes, managed care companies and other healthcare related businesses throughout Missouri and Kansas. The GKCSHA was organized in 1989 as a non-profit organization to "further and improve the practice of law with special emphasis upon hospital and healthcare law and regulation" and to contribute to continuing legal education in accordance with the pertinent statutes of both Missouri and Kansas. Like FAHA,

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[1] As required by Rule 37.6 of this Court, the *amici curiae* submit the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

GKCSHA provides its members with opportunities for education, discussion, professional interaction and consultation and advocates for the interests of its members when global practice issues are at stake.

The Health Care Law Section of the State Bar of Michigan has over 800 members.[2] Membership in the Section is open to all members of the State Bar of Michigan. The Section provides education, information and analysis about issues of concern in the health care industry through meetings, seminars, a web site, public service programs, and various publications.

The Kansas Association of Hospital - Attorneys ("KAHA") consists of 72 members who practice healthcare law, representing hospitals, physician practices, nursing homes, and other healthcare related businesses. Its members come from all across the State of Kansas. KAHA provides its members with opportunities for continuing legal education, professional interaction and consultation in the healthcare field.

The Oklahoma Health Lawyers Association ("OHLA") was formed in 1987 as an affiliated organization of the Oklahoma Hospital Association for attorneys whose practices consist largely of health law matters. It presently boasts 80 members, each of whom devotes a substantial portion of his or her practice to the representation of health care providers and is committed to improving the quality of the practice of law in Oklahoma through continuing education and similar activities. The Bylaws of the OHLA describe the purposes of the organization as follows: (i) to provide an opportunity for lawyers to exchange information and ideas; (ii) to sponsor seminars of interest to lawyers; (iii)

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[2] It is only the Section that has agreed to support this brief. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

to encourage the exchange of information relating to health law; (iv) to establish a network of health lawyers to assist other lawyers who may have an interest or who may represent clients in the health care field; (v) to publish newsletters and other publications of interest in the area of health law; (vi) to conduct legal and other research and to publish or offer for publication the results of such research; (vii) to study and evaluate legislative proposals; and (viii) to engage in other activities which further these purposes.

The foregoing organizations all have a palpable interest in having this Court resolve the uncertainty surrounding the interpretation of the Medicare Anti-Kickback Statute by the federal courts, specifically as it relates to the various standards used to determine whether a defendant's conduct exhibits the intent to induce referrals. Each of the foregoing organizations agrees that the "one purpose" test adopted by the Tenth Circuit below is contrary to the intent of Congress and enforcement agencies, as reflected by statutory amendments, regulations and advisory opinions.

Legal representation of the health care industry may be compromised by the Tenth Circuit's interpretation, because it places health care attorneys in an impossible position to reconcile a myriad of conflicting statements and interpretations in advising their clients. Moreover, conscientious, law-abiding attorney-members of these organizations may themselves be at risk of criminal indictment under this overly-restrictive standard. Aggressive prosecutors may target these attorneys if circumstantial evidence suggests that a client engaged in one of many beneficial transactions that are common in the health care field, that the client was motivated "at least in part" by the expectation and desire to obtain patient referrals from the transaction, and that the lawyer prepared the legal documentation of that transaction.

These organizations are also concerned that the continuation and spread of the "one purpose" test for determining violations of the Anti-Kickback Statute will adversely affect the practice of law and the ability of health care attorneys to represent their clients effectively. This interpretation of the Statute hinders the full and frank disclosure and atmosphere of trust that is a central part of the attorney-client relationship. Moreover, the risks posed to attorneys practicing in this uncertain field will result in a dramatic and unnecessary increase in legal costs to an industry for which cost-containment is an ever-present concern.

INTRODUCTION

Attorneys practicing in the health care field took special notice when Petitioner, along with two lawyers who had advised the hospital for which Petitioner served as an executive officer, was indicted for violations of the Medicare Anti-Kickback Statute. 42 U.S.C. § 1320a-7b. The immediate and close scrutiny of the case surfaced due to the unique nature of the prosecution, fairly characterized as unprecedented in multiple respects. *First*, the allegations in the indictment focused upon the implementation of contracts for administrative services, which are commonly entered into in the ordinary course of business between hospitals and physicians and which the government conceded were lawful on their face. *Second*, the government advanced the theory that the Statute would be violated even if the payment to the doctors under the contracts had a legitimate purpose and even if the hospital did not require referrals in exchange for the payments, so long as the hospital entered the relationship in part out of a desire for patient referrals. *Third*, the government contended that such an arrangement was unlawful, even if the program developed in the contract was beneficial to patient care, did not result in any unnecessary treatment, and provided efficiencies that saved the Medicare program money. *Fourth*, the indictment was the first to

name lawyers, based on the lawyers' conduct in providing legal advice and drafting assistance in the preparation of these routine contracts. *Fifth*, the indictment (issued in 1998) alleged conduct spanning a ten-year period (from 1984 to 1995), during which time the facially vague Anti-Kickback Statute was interpreted in shifting and inconsistent ways by courts, the enforcement agency, the Congress and industry commentators.

Health care attorneys, who are regularly called upon to review the past practices of their clients and to provide advice regarding the legality of proposed future transactions, hoped that resolution of this case would clarify some of the ambiguity arising out of previous applications of the Anti-Kickback Statute. Unfortunately, the Tenth Circuit's decision instead produced tension with the case law of other courts and the administrative guidance of enforcement agencies, and thereby generated even more uncertainty for health care providers and their counsel. This confusion, arising in the context of an important federal statute that impacts every consumer of health care services, raises questions of substantial importance that should be resolved definitively by this Court now.

SUMMARY OF ARGUMENT

The Tenth Circuit approved a jury instruction that permits juries in that jurisdiction to convict defendants under the Anti-Kickback Statute if the defendants had, as "one purpose" of the transaction at issue in the indictment, the purpose "to induce" patient referrals for services payable by Medicare. Courts in other circuits, including the First, Eighth, Ninth and Eleventh, have adopted different formulations of the Statute's "inducement" requirement. Those interpretations permit conviction only if the defendant acted with a "primary purpose" or a "material purpose" to induce referrals. These semantic differences have real world consequences for defendants and the attorneys who give

legal advice. The "one purpose" test broadly criminalizes an array of normal business relationships that are historically recognized as legitimate and that in no way harm the Medicare program. Both the "material purpose" test and "primary purpose" test hew closer to congressional intent in confining the reach of the Statute to schemes designed to "pay for patients."

Health care lawyers face particular difficulties in advising clients concerning the legality of proposed transactions and practices their clients would like to adopt. Not only does the law differ in different jurisdictions, but the impossibility of administering a "one purpose test" makes legal advice so equivocal as to be useless to a client who is, in good faith, attempting to abide by the law. This uncertainty on the part of the advice-givers leads to client frustration and a break-down in the normal communicative channels that are essential to a well-functioning attorney-client relationship. Because the Anti-Kickback statute is an important federal initiative, the enforcement of which will have effects on all who consume health care services, it is important for this Court to grant certiorari now to clear the interpretive confusion among the courts and in the industry.

ARGUMENT

Health care lawyers have struggled to provide clear guidance to clients concerning the application of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, since the original enactment of the Statute in 1972. Part of the difficulty lies in the breadth of the statutory language, which by its terms appears to prohibit a host of beneficial transactions, historically recognized as legitimate business practices that are inherently necessary to the delivery of quality medical care in an economically efficient manner. Definitive answers to questions about the application of the Statute to everyday health care transactions are further obscured by the unclear relationship among various undefined elements in

the Statute, such as the intent requirement (to act "knowingly and willfully") and the purpose requirement embedded within the *actus reus* (offer "to induce" or solicit "in return for").

The direction that has come from courts and agency pronouncements has only exacerbated the difficulties arising from the interpretation of the Statute on a blank slate. Various courts have approved jury instructions that differ materially from each other, causing certain behaviors to be arguably acceptable within one jurisdiction and not others. The different approaches in different jurisdictions leaves health care attorneys without means to advise clients with any clarity or certainty how to behave in a manner that complies with the law. This inability leads to a less communicative and productive attorney-client relationship, and will likely exacerbate, rather than mitigate, core instances of health care fraud.

I. The Tenth Circuit's Approval of a Jury Instruction Permitting Conviction If a Desire For Referrals Was One Purpose of the Transaction Collides With The Interpretation of the Statute Espoused In Other Circuits

The Anti-Kickback Statute imposes felony sanctions on any person who

> [K]nowingly and willfully offers or pays any remuneration (including any kickback, bribe or rebate) . . . to any person to induce such person . . . to refer an individual to a person for the furnishing . . . of any item or service for which payment may be made in whole or part under a State health care program.

42 U.S.C § 1320a-7b(b)(2)(A). The Tenth Circuit approved a jury instruction explaining the meaning of the requirement

that the offer of remuneration be "to induce" referrals as follows:

> To offer or pay remuneration to induce referrals means to offer or pay remuneration with the intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must, *at least in part*, have been the reason the remuneration was offered or paid.

Pet. App. 20a (emphasis in original). The District Court stressed in its instruction that the defendants could not be convicted if the remuneration "was designed wholly for other purposes." *Id.* Accordingly, the Tenth Circuit reinstated Petitioner's conviction based on a 1993 contract that "appears to encompass a legal arrangement," simply because "the evidence supports a reasonable inference that McClatchey never would have supported negotiating and entering into that contract absent his intent to induce the LaHues to continue referring their patients to Baptist." *Id.* at 10a.

The Tenth Circuit's conclusion flowed from *United States v. Greber*, 760 F.2d 68, 69 (3d Cir. 1985), which held, in the context of a classic kickback arrangement, that "if one purpose of the payment was to induce future referrals, the medicare statute has been violated." *Greber* was one of the first cases to be decided under the amended Anti-Kickback Statute, and occurred at a time before the need for cost-containment and managed care became pervasive in the health care industry. *Greber* quickly became viewed as outdated given the realities of the health care industry and subsequent changes in the Statute, and was rejected or largely ignored by subsequent courts interpreting the Statute.

In *United States v. Bay State Ambulance and Hospital Rental Service*, 874 F.2d 20, 29 (1st Cir. 1989), the district court gave the following instruction:

> [T]he Government has to prove that the payments were made with a corrupt intent, that they were made for an improper purpose. If you find that payments were made for two or more purposes, then the Government has to prove that the improper purpose is the *primary purpose* or was the *primary purpose* in making and receiving the payments. It need not be the only purpose, but it must be the primary purpose for making the payments and for receiving them. You cannot convict if you find that the improper purpose was an incidental or minor one in making the payments. (Emphasis added.)

On appeal by the convicted defendant, the Court held this instruction was consistent with the congressional intent. *Id.* at 30. It commented that the verdict indicated the jury had correctly applied the instruction, because the jurors acquitted the defendant on some counts for which they may have believed that the "payments were compensation for work done with only an incidental improper purpose." *Id.*

Courts in the Eighth Circuit have followed *Bay State* in instructing the jury. In *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996), the Court stated that the Anti-Kickback Statute prohibits "willful conduct—receiving remuneration *for referring patients*," *id.* at 440, and thereby requires an instruction that the defendant knew he was acting wrongfully. The jury in *Jain* was told it must acquit if the defendant "believed he was being paid for promoting North Hills, not for referring patients." *Id.* This intent instruction comported with the "inducement" definition given to the jury in that case, permitting conviction only if "the remuneration was . . . paid *primarily* in order to induce" referrals. *United States v. Jain*, Nos. 94-00087-01, 94-00087-02-CR-W-6 (W.D. Mo. 1995), *aff'd in part and rev'd in part on other grounds*, 93 F.3d 436 (8th Cir. 1996) (Instruction N).

Courts in the Ninth and Eleventh Circuits have taken yet a different approach in reconciling the Statute's "knowing and willful" requirement with the "inducement" element. In *Hanlester v. Shalala*, 51 F.3d 1390, 1399 (9th Cir. 1995), the Ninth Circuit considered the application of the Anti-Kickback Statute to joint venture agreements with laboratories that "were fairly common" in the industry. Despite "ample evidence that appellants intended to encourage limited partners to refer business to the joint venture laboratories," the Court held that "[t]he fact that a large number of referrals resulted in the potential for a high return on investment . . .[was] insufficient to prove that appellants offered or paid remuneration to induce referrals." *Id.* Accordingly, the Court held the evidence insufficient to prove "knowing and willful" violations by those who did not condition the amount of participation in the venture according to the amount of business referred. *Id.* at 1400. Consistent with this guidance, courts in the Ninth and Eleventh Circuits direct that defendants may only be convicted if their desire to induce referrals is a "material purpose[]" of the transaction. *United States v. Kats*, 871 F.2d 105, 108 n. 1 (9th Cir. 1989); *United States v. Siegel*, 94-156-CR-T-23C (M.D. Fla. 1996), *aff'd in part and rev'd in part on other grounds United States v. Starks*, 157 F.3d 833 (11th Cir. 1998) (instructions required that "one *material* purpose, that is an *important* purpose, of the payment is to induce referrals") (emphasis added).

II. The Various Approaches to the Statute Leave Health Care Lawyers Unable To Assist Clients In Structuring Normal Business Relationships Legally

The confusion exhibited in these varying descriptions of the intent and inducement requirements of the Statute arises from the perception of some courts and advocates that the "one purpose" standard, if taken seriously, would prohibit any economic incentives paid to establish a delivery system

for efficient medical care – a result that is absurd in the context of industry realities. The transition toward managed care from a fee-for-service model makes the absurdity abundantly clear. Physician providers offer services to a managed care plan at a discounted rate (PPOs and some HMOs) or fixed fee (HMOs), in order to assure a steady stream of patient referrals from the plan. By its nature, the decision of both parties to these transactions is influenced by the desire to obtain or provide referrals, and the payment structure thereby influences the doctors' decisions about the patients' medical care. *See Pegram v. Herdrich*, 120 S. Ct. 2143, 2149 (2000). Even in a fee-for-service regime, providers constantly make economic decisions that will optimize both the quality and quantity of care.

Health care attorneys are met with a deluge of requests for advice concerning the legality of an array of ordinary business practices under the Anti-Kickback Statute. For instance, these attorneys evaluate programs conferring hospital staff privileges. By their nature, staff privileges involve the conferring of a benefit on a physician – the right to use hospital facilities (*i.e.* a remuneration) – and the expectation that the physician will use the hospital to treat his or her own patients (*i.e.* a referral). Often, hospitals consider the number of treatments performed by the applying physician at that hospital to ensure the hospital has sufficient experience with the physician's abilities to admit him or her. May a jury infer that the hospital or its executives have violated the Statute by considering the number of patients the doctor has brought to the hospital in order to assure itself that the doctor is qualified? A health care attorney's conclusion in this regard cannot, in any case, give a clear answer. But counsel's assessment of risk will differ in a jurisdiction that has approved an instruction that the offer to induce must be one purpose, rather than a material purpose or a primary purpose, of the transaction. And how should an attorney advise clients that operate in two different jurisdictions (such

as those based in Kansas City, which often have facilities both in Kansas – under the province of the Tenth Circuit, and Missouri – under the province of the Eighth)? The growth of multistate health care systems in the 1990s only exacerbates the quandary. For example, Ascension Health spans eight federal judicial circuits (http://www.ascensionhealth.com) and Tenet spans nine (http://www.tenethealth.com).

Similar problems arise when health care providers seek advice regarding physician recruitment standards. Hospitals wishing to recruit physicians to locate to a hospital's service area following completion of residency historically have paid moving allowances and income guarantees. In making the decision whom to recruit, a hospital necessarily evaluates its needs for various types of specialists, which evaluation includes an assessment of the community's demographics and possibly anticipated referral rates. As with staff privileges, a health care attorney's assessment of the risks associated with these practices will vary depending on the jurisdiction in which the hospital acts.

A third example may be seen in the context of offering payment to provide services as medical directors of programs and clinics run by a hospital for a fee. A hospital may have a choice between two candidates, both qualified, but one who has a nationally renowned reputation and a large patient following. If the hospital selects the well-known practitioner and pays a fee commensurate with that practitioner's level of experience, not only because the hospital believes his or her reputation will increase hospital business generally but also because it hopes that the more renowned medical director will treat his or her large number of patients at the hospital, is the hospital at risk of a felony conviction because "one purpose" of the decision was to maximize the number of patients it would receive through selection and payment of a medical director?

The inconsistency of the enforcement agency's approach to the Statute also can be seen in the response of the Department of Health and Human Services ("HHS") to so-called "gainsharing" programs. Gainsharing is essentially a plan to align the economic incentives of hospitals and physicians to provide cost-effective care through a plan for sharing the resultant cost savings or revenue increases (the "gains") in some combination of a percentage payment, hourly fee, or fixed fee.

Early in the 1990s, HHS' Health Care Financing Administration ("HCFA") instituted a demonstration project for heart bypass services that has served as a genesis for a number of gainsharing programs.[3] The stated purpose of the demonstration project was to assess the feasibility and cost-effectiveness of a negotiated global (or bundled) payment arrangement for coronary artery bypass graft surgery while maintaining high-quality care. The seven participating hospitals received a global fee that covered Medicare Part A (which reimburses hospital services) and Part B (which reimburses physician services) and represented a substantial discount for Medicare from the otherwise applicable Part A and Part B rates. Hospitals and physicians were left to their own agreements as to how to allocate the global fees.

HCFA's report notes that apart from the demonstration project, all hospital-provided items and services were essentially free to the physicians because they bore none of the related financial risk. It was expected that the global fee would provide a means for hospital management to align incentives and encourage physicians to be more cost-

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[3] For an executive summary of HCFA's findings, see the Extramural Research Report on the Medicare Participating Heart Bypass Center Demonstration Project (Sept. 1998), available online at www.hcfa.gov/ord/ordhp1.htm. The entire report is in three volumes totaling approximately 900 pages and is available from the National Technical Information Service, (800) 553-NTIS.

effective consumers of hospital resources. One hospital in the demonstration project shared the gains with physicians through bonuses to individual surgeons based on documented cost savings to the hospital (up to 25% of the savings with no downside risk to their negotiated portion of the global fee). Surgeons were eligible for the gainsharing payments only if they met stringent quality and volume criteria. From HCFA's perspective, the demonstration project was a clear financial success, resulting in savings of approximately $50 million for the Medicare program and beneficiaries' copay obligations.

Despite these promising beginnings for gainsharing programs and a favorable review from the IRS (in two unpublished private letter rulings), the reaction of HHS' Office of Inspector General ("OIG") to privately developed gainsharing programs was much more negative. In response to pending requests for an advisory opinion that such programs did not violate the Anti-Kickback Statute or the related Civil Monetary Penalties ("CMP") law (42 U.S.C. § 1320a-7a(b)), OIG issued a Special Advisory Bulletin (July 1999, available at http://oig.hhs.gov/frdalrt/gainsh.htm). In the Bulletin, OIG concluded, again painting with a broad brush, that many gainsharing programs violated the CMP law and that "[g]ainsharing arrangements may also implicate the anti-kickback statute." Absent a clear safe harbor (and there is none), whether or not a gainsharing program violates the Anti-Kickback Statute depends on whether or not the requisite bad intent is present (following the same confusing, jurisdiction-by-jurisdiction standard outlined above). Perhaps the most troubling aspect of gainsharing programs under the Anti-Kickback Statute is that question of intent. Many gainsharing programs may be motivated at least in part by a desire of hospitals to increase specialty referrals or forestall competition from the growing number of niche, specialty hospitals in areas such as cardiac care and

oncology.[4] HHS' HCFA itself, however, acknowledged the benefits to the Medicare program of gainsharing in its Report on the Demonstration Project.

Not only do the differing "inducement" standards offered by the courts and agencies make it difficult to provide clear-cut advice to clients, the "one purpose" rule makes it impossible in some situations to provide legal assistance at all due to a concept akin to original sin. Assume that a client comes to a lawyer for advice about an innovative program that involves both "remuneration" (at fair market value for the benefit obtained) and "referrals." The client-representative tells the lawyer that the hospital has approved implementation of this program, because the hospital believes the program will fill a community need and provide more efficient care than other alternatives. During the conversation, he also mentions that the hospital president has expressed the belief that the program will enhance the hospital's revenues by providing patient referrals it would not receive absent implementation of the program.

The lawyer is in a quandary if he believes that client's overriding purpose in adopting the program is legitimate and will benefit the community, but the program is a new concept that cannot be shoehorned into a pre-existing safe harbor under the Statute. Because one decisionmaker had already expressed the view that patient referrals were a component of his evaluation of the program and decision to approve it, the transaction – if viewed through the lens of the "one purpose" doctrine – is forever tainted. No matter how much the company wants to comply with the law and wants the assistance of a lawyer to structure the transaction legally, it cannot unring the bell and proceed with certainty that its program will, in hindsight, be considered legal by a prosecutor or a court.

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[4] *See* M.C. Jaklevic, *Remembering the Specialists*, MODERN HEALTHCARE, April 26, 1999, at 35.

The health care lawyer's dilemma is further complicated by the conflict of the Anti-Kickback Statute with the Ethics in Patient Referrals Act (popularly known as the "Stark Law"), 42 U.S.C. § 1395nn – a conflict which is apparent but repeatedly and consciously ignored by OIG.[5] For example, OIG asserted in the recent safe harbor regulations that the Stark Law is a civil statute whereas the Anti-Kickback Statute is a criminal statute, the two statutes serve different purposes and the Stark Law does not have an intent element whereas the Anti-Kickback Statute does.[6] Although those distinctions may be technically accurate, the two statutory schemes do both regulate the business transactions of health care enterprises and they are administered by the same agency (HHS, through OIG for the Anti-Kickback Statute and HCFA for the Stark Law). The conflict of these statutory schemes, not to mention the conflict with the restrictions imposed by the Internal Revenue Service for tax-exempt health care providers, makes the compliance task a difficult one indeed for today's health care executives. Lack of a clear intent standard under the Anti-Kickback Statute, where intent is most relevant, is a significant contributing factor to that difficulty.

The practical realities of the health care industry were important to this Court's recent decision in *Pegram*. In that case, the Court interpreted ERISA's requirement that ERISA plan fiduciaries "discharge their duties . . . 'solely in the interest of the [plan] participants,'" 120 S. Ct. at 2151 (quoting 29 U.S.C. § 1002(21)(A)(iii)), in a context where the fiduciary was a Health Maintenance Organization. Citing congressional approval of managed care programs in the Health Maintenance Organization Act of 1973 and the

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[5] The Stark Law restricts referrals by a physician who has a financial relationship with the party to whom the referral was made, unless a specific statutory or regulatory exception applies.

[6] 64 Fed. Reg. 63517, 63519 – 63520 (Nov. 19, 1999).

practical economic concerns motivating the development of managed care plans, *id.* at 2156-57, the Court held that managed care plans could not be held liable for establishing incentive structures that might affect adversely the medical treatment of plan beneficiaries, even if the plans were ERISA fiduciaries for some purposes. *Id.* This Court therefore limited broad ERISA language in light of health care industry realities and congressional statements indicating that financial incentives affecting patient care decisions are not *per se* nefarious or wrongful. *Cf. United States v. Sun Diamond Growers*, 526 U.S. 398 (1999) (interpreting narrowly a criminal statute to prevent the criminalization of apparently innocent conduct). Likewise, this Court should intervene to provide clarity regarding the broadly-phrased intent standard of the Anti-Kickback Statute, in the face of industry realities and the express endorsement of health care delivery systems that necessarily marry the concepts of remuneration and referrals.

III. The Disarray In The Circuits and the "One Purpose" Standard in Particular Negatively Impact The Attorney-Client Relationship

If this Court now declines to bring the varying interpretations of the Anti-Kickback Statute into conformity, the relationship between health care clients and the attorneys that advise them about the fraud and abuse rules that govern their behavior will suffer. In the present legal environment, lawyers are placed in a position where they are unable to provide clear guidance concerning the legality of individual transactions and, indeed, must cautiously advise clients that nearly every transaction contains legal risk in light of the "one purpose" standard. This situation leads to frustration on the part of clients born of the perception that they are paying costly legal fees without receiving helpful input. Because the fraud and abuse rules are particularly complex, arcane and, in some instances, counterintuitive, it will disserve congressional intent to discourage health care

providers from seeking legal advice. Such discouragement may lead to more widespread adoption of transactions (without or against legal advice) that are not only in the gray area, but are clearly foreclosed under any of the legal standards in place.

Even if no client was deterred from seeking advice from lawyers in this environment, the message sent by the Tenth Circuit may cause clients to filter what they tell their lawyers. If clients become aware of the "original sin" problem discussed above and believe that a lawyer may refuse to assist in the drafting of a transaction, they will simply decline to apprise attorneys that a referral effect has, in fact, been considered. This filtering process is not necessarily indicative of an unlawful motive to violate the Anti-Kickback Statute, but will no doubt ensure that a lawyer's advice is not based upon the full and frank disclosure of all potentially relevant facts. Such an effect should not be encouraged.

The "one purpose" rule also increases the cost of legal services. An attorney asked to determine whether a particular transaction is legal in the Tenth Circuit must conduct an exhaustive investigation into the deliberative process of forming that transaction. Instead of acting through a client representative authorized to present the hospital's position, the attorney may feel obliged to interview every executive who commented upon the program in order to determine whether any one executive had, as "one purpose" of his decision to approve the program, the notion that the program would favorably impact referrals to the hospital. Moreover, many programs take years to develop or are implemented and renewed over several executive administrations. Must the attorney contact former executives to determine the initial intent of the program developers in order to ascertain whether the present executive board is placing the hospital at risk by renewing a particular program?

Increased legal costs may also arise out of the atmosphere of concern that has arisen in the wake of the indictment of two attorneys in this case. Fearing that they might be implicated in a conspiracy by assisting a client in drafting a contract without knowing the client had a motive to obtain patient referrals, attorneys may begin to document in memos to the file all oral communications with the client to preserve a record upon which the attorney's advice was based. Alternatively, attorneys may insist upon conducting all client interviews with more than one lawyer present, to prevent a "he said/she said" contest when an investigation begins. The fear motivating this self-protective behavior is more palpable in a world where the "one purpose" standard is the rule. If even incidental, immaterial motives alongside overwhelmingly legitimate motives are enough to make the transaction unlawful, attorneys will be less likely to be able discern from interactions with the client whether the client is motivated to obtain referrals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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